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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1555

IRA SYLVESTER GODFROY, *et al.*, etc.

v.

UNITED STATES OF AMERICA

MIAMI TRIBE OF OKLAHOMA, *et al.*, etc.

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The undersigned, on behalf of Madeline F. Maloney and Walter H. Maloney, Jr., co-executors of the estate of Walter H. Maloney, Sr.; Walter H. Maloney, Jr.; and the law firm of Kiley, Osborn, Kiley, and Harker; and Ira Sylvester Godfroy,

et al., appellants below in Appeals Docket 6-71 of the United States Court of Claims, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in Appeals Docket 6-71 and its consolidated companion case, Appeals Docket 8-71.

OPINIONS BELOW

There are three split opinions of the United States Court of Claims in these two consolidated dockets. The first opinion, with three judges dissenting, was rendered on April 11, 1972, and is reported at 198 Ct. Cl. 1 and at 458 F.2d 93. The second opinion, reversing the first opinion, with two judges dissenting, and one judge deceased, was rendered on October 13, 1972, on motion for reconsideration, and is reported at 467 F.2d 909. The third opinion, which affirms the second opinion, two judges dissenting, was rendered on February 22, 1973, upon a second motion for reconsideration, and is yet unreported. (See Appendix).

JURISDICTION

The final judgment of the Court of Claims in the two consolidated dockets was entered on February 22, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Indian Claims Commission erred in failing to award attorney fees between the two separate groups of attorneys representing the two separate respective

distributed to respective tribal clients, or, equally between the two groups of tribal attorneys.

STATUTES INVOLVED

The relevant portion of the Indian Claims Commission Act (60 Stat. 1053, 25 U.S.C. 70 n) provides:

> "Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim, but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amounts recovered in any case."

Also relevant are the provisions of the Miami Indian Distribution Act, approved June 2, 1972 (86 Stat. 199, 25 U.S.C. 1122, *et seq.*), set forth in the Appendix.

STATEMENT OF THE CASE

The underlying facts show that on June 5, 1854 the Miami Tribe of Indians separated itself into two legal tribes by a formal treaty, ratified and proclaimed by an Act of Congress of August 4, 1854 (10 Stats. 1093). At that time there were 302 Indians known as "Indiana Miamis" and 247 Indians known as "Western Miamis" or "Oklahoma Miamis".

The Indiana Miamis brought suit on July 2, 1951 under the Indian Claims Commission Act (Dockets No. 124-C, 124-D, 124-E and 124-F) for inadequate compensation for certain Indiana lands. The Oklahoma Miami subsequently, through different legal counsel, brought a similar suit (Dockets No. 255, 256). These cases were consolidated for hearing. Ultimately these cases were settled after some litigation by compromise awards totalling $1,373,000 under date of December 3, 1968 (20 Ind. Cl. Comm. 97, 113). The Commission was requested to apportion the awards between the two plaintiff groups but failed to do so. An appropriation act (83 Stat. 49) and a distribution act (86 Stat. 199) ultimately ordered distribution of the proceeds on a *per capita* basis.

Attorneys for the Oklahoma Miami have asserted throughout that they were entitled to attorneys fee equal to ten per cent of the entire recovery for all Miami Indians and that Indiana Miami counsel were entitled to nothing. The latter, petitioners herein, assert that attorneys' contracts and applicable statutes limit attorneys to

recovering legal fees of ten per cent of what their respective clients may recover.

The evidence shows that in 1968 there were a total of 4,296 Miami Indians. Of these, 1,230 (or 29.9%) were Oklahoma Miami and 3,066 (or 70.1%) were Indiana Miami. The award will be paid out or apportioned similarly, and petitioners argue that attorneys' fees should be paid accordingly.

The Commission found that both sets of attorneys rendered valuable services to their respective groups of clients, but instead of awarding attorneys fees to each set of contending attorneys on the basis of the amounts that each had recovered for his clients under their respective contingent fee agreements approved by the Bureau of Indian Affairs, the Commission undertook to regard the consolidated tribal awards as available as a common pool to pay both sets of attorneys in any manner the Commission might see fit. The Commission purported to review some twenty years of legal services by each set of attorneys to their respective clients, and apportioned the total amount available for the payment of all attorneys' fees in the ratio of 70% to Oklahoma Miami Counsel and 30% to Indiana Miami Counsel (24 Ind. Cl. Comm. 450, entered Feb. 18, 1971). From this decision, both sets of attorneys noted appeals to the Court of Claims.

The Court of Claims rendered not one but three decisions, and also three dissenting opinions, in the appeal before it was finally decided below.

1. In its first decision, a four-member majority of the panel then sitting reversed the Commission, and, in

an opinion written by Judge Skelton, stated that the "disproportionate" decision of the Commission was

> "contrary to the contracts and the Indian Claims Commission Act, is at a variance with the findings of the Commission, does violence to the rights of the attorneys representing the Miami Indians of Indiana by awarding fees rightfully belonging to them to the Oklahoma attorneys who are not legally entitled to them, and violates the rights of the Indians by imposing on them the services of the Oklahoma attorneys whom they did not employ and with whom they have no privity of contract, and awards fees to such attorneys that belong to the Indiana Indians themselves if not paid to their attorneys. Furthermore, the decision is arbitrary, and is not supported by substantial evidence, is unjust and inequitable, as shown below." 458 F.2d 93, 96.

The original court majority ruled that the tribal awards here in question are owned jointly and equally by the two tribal claimants, as in the case of a joint tenancy of a parcel of real estate, and hence attorney fees should be equally divided between their attorneys. A dissenting opinion was filed by Judge Davis and joined in by two judges. This dissent upheld the action of the Commission in apportioning all fees from the consolidated award and deferred to the trier of fact the determination that a seventy-thirty division in favor of the Oklahoma Miamis attorneys of fees from the joint awards was appropriate in these cases.

2. The Oklahoma Miami attorneys filed a motion for reconsideration of this decision. Between the filing of the first decision on April 11, 1972, and the second decision on October 13, 1972 on the Motion for Reconsideration, Judge Collins, who had voted with the majority in the first decision, died. The second decision was then decided by a six-judge panel, Senior Judge Durfee changing his position to vote with the original three-judge minority in the first decision. The second opinion of the Court of Claims was rendered by Senior Judge Laramore, and it upheld the original seventy-thirty division of fees as apportioned by the Commission. A vigorous dissent was filed by Judge Skelton, the author of the majority decision in the first instance. He was joined by Chief Judge Cowan. 467 F.2d 909.

3. After the Court of Claims had reversed its original decision, Indiana Miami Attorneys, Petitioners herein, filed their Motion for Reconsideration. This motion was denied per curiam on February 22, 1973. Again, Judge Skelton, joined by Chief Judge Cowan, filed a dissenting opinion, in which he pointed out that the Commission and the new Court of Claims majority ignored the attorney contracts involved herein, the findings of the Commission, and the Act. Judge Skelton referred to the recently enacted Miami Indian Distribution Act (P.L. 92-309, approved June 2, 1972) and to the House Committee Report which accompanied its enactment. He noted the more recent statistical count of Oklahoma and Indiana Miami contained therein showing 816 Oklahoma Miami and 3066 Indiana Miami, stated that, as the awards were being distributed per capita, Oklahoma attorneys had thereby recovered 816/3882nds of the awards for their clients, while the Indiana Miami Attorneys had recovered 3,066/3882nds of the awards for their clients, and thus, the

Oklahoma Miami by obtaining 70% of all attorneys fees awarded, received in effect 33% of the amount they had recovered for their clients while the Indiana Miami Attorneys had recovered only 3.6% of the amounts recovered for their clients, while both contracts limit the amounts to 10%.

Indiana Miami Attorneys petition this Court for a writ of certiorari to review the third and final decision of the Court of Claims herein, dated February 22, 1973.

REASONS FOR GRANTING THE WRIT

This is a matter of great importance to all Indian tribal claimants and their attorneys. It also related to claimants in class actions and their attorneys generally. It concerns the conduct of all class actions and the compensation of counsel for separate groups of claimants who have brought separate actions *which were consolidated for hearing only.*

Also, this case presents an instance wherein the same underlying policy considerations which relate to conflicts between circuits exists at the Court of Claims, namely sharply different decisions depending upon the constituency of the panel to which the question was addressed. This difference has not been finally resolved below by that Court itself, despite the fact that two motions for reconsideration were filed and determined.

The original panel which heard this appeal from the Commission consisted of five regular members of the Court and two senior judges who sit only from time to time. The only difference which arose from the time of the first decision by the Court of Claims and its reversal in the second decision did not spring from a change

in the law but from a change in the constituency of the court. Three regularly-sitting judges of that Court (Kashiwa, Kunzig, and Bennett) have yet to rule on the question presented herein. As this question exists in other pending and potential fee applications in Indian claims matters and other cases, it is quite possible that the Court of Claims may yet reverse itself again simply because the case will be presented to a different panel of judges. The majority decision, for which we seek review, was arrived at by two senior judges, one of whom reversed his position between the first and second decisions, and two regularly-sitting judges. In such a close and contended matter, such a decision does not constitute settled law, and there is no chance in this litigation of arriving at a settled position by the court below. We contend that there should be both uniformity and finality in determining the proper manner of compensating attorneys who represent classes of claimants before the Commission, and that the matter should not be left to the happenstance of which group of Court of Claims judges is empanelled when an appeal is heard. The absence of uniformity in such a divided court will serve only to generate future litigation on this point. It will not serve the interests of the Indians or their attorneys or others, nor will the present situation promote confidence or economy in the administration of the Indian Claims Commission Act.

The question herein on apportionment of attorneys fees is not limited solely to the present case or the present set of attorneys. The Commission has, since its inception, entertained some 610 docketed claims, of which 254 remain to be adjudicated. Of those already adjudicated, some twenty-five consolidated dockets, including the one at issue herein, have been disposed of

on the merits of the claim. (Indian Claims Commission Annual Report to Congress, 1972, p. 15; App. 2). A substantial number of matters including the remainder of the Miami claims, the Potawatomi claims, and claims involving other tribes as well, are being adjudicated in consolidated dockets involving multiple tribes and tribes which have fragmented into separate organizations since treaty time. In all of these cases, if awards are made to the tribes on the merits of the claims, the matter of apportioning attorneys fees will thereafter be before the Commission. The decision finally announced by a majority of the court below will enure to the serious detriment of the legal profession in the trial of pending cases before the Commission and as general judicial precedent. As Judge Skelton pointed out in the opinion which constituted the Court of Claims' original decision, a fixed rule of fee apportionment between attorneys

> "will tend to eliminate rivalry, bickering, overreaching, and competition among lawyers as to who will take the lead and put on the evidence in future cases. It will also expedite such trials by preventing duplication of effort by the attorneys, as well as corresponding duplication of evidence and endless arguments as to which attorney did the most work. These cases are troublesome enough without having difficulties of this nature." 458 F.2d 93, 104.

The reverse is equally evident. A practice of allowing the Indian Claims Commission limitless flexibility and authority to impose, without standards and in lieu of standards set forth in the Act, whatever division of fees may suit its pleasure will necessarily tend to promote and encourage the problems outlined by Judge Skelton above.

Indian claims litigation can be classed among the most protracted litigation in our entire administrative and judicial system. The claims for which fees are sought in the instant case were first filed by Mr. Maloney in July, 1951. The compensation to his estate and his successors as well as the compensation of any claimant's attorney, is wholly contingent upon recovery, and if there is no recovery, many years of professional time, talent and untold expenses go wholly unrewarded. Those undertaking such legal services are faced with what amount to "careers" rather than cases. If, in serving their clients, they are forced into being sidetracked by a wholly legitimate concern as to how or whether they will be paid even when they win, such foreboding can only enure to the detriment of the Indians and prevent accomplishment of the purposes of the Act. Congress established the Commission to apply judicial standards and precedents to the sometimes harsh facts of history in order to compensate Indian tribes for losses and injuries suffered during the historical process by which this nation was settled. In so doing, Congress envisioned the adjudication of claims in traditional adversary proceedings, with the United States serving as the defendant. In any adversary proceeding, the effectiveness of counsel is of critical importance; indeed, the righting of all wrongs to Indians cannot be accomplished at all without the willingness of private attorneys to undertake the risky enterprise of a long-term litigation on the basis of contingent fees payable only out of recoveries. Their effectiveness is, and will be impaired if attorneys for allied Indian claimants are encouraged by flexible and arbitrary fee-setting practices of the Commission to dispute among themselves before taking up legal problems of their clients against the Defendant. In short, the Commission's fee apportionment practice and policy, in addition to being

illegal, *ultra vires*, and inequitable, undermines the effectuation of the congressional policy manifested in enacting the Act and in establishing the Commission.

The Commission, and the second majority panel of the Court of Claims, was clearly wrong in that Congress established a maximum of ten percent in the recovery of attorney's fees in Indian claims cases. The contracts of the contending attorneys, as approved by the Bureau of Indian Affairs, contain the same limitations. Yet, as Judge Skelton pointed out in his dissent to the Third Decision, the Commission has in effect awarded the Oklahoma Miami attorneys a fee which amounts to 33% of what they have recovered for their clients, the Oklahoma Miami, and has in effect awarded to Indiana Miami attorneys a fee amounting to only 3.5% of what they have receovered for their clients. It is up to Congress to distribute Indian claims awards to individual Indians and Congress has in fact done so by an Act approved June 2, 1972 making a *per capita* distribution. The determination of fees in proportion to recoveries by the Oklahoma and Indiana Miami themselves is in no sense conjectural or "speculative" as the Commission has stated (24 Ind. Cl. Comm. 454). By its fee apportionment determination, the Commission has violated both the terms of the Indian Claims Commission Act and the Miami Indian distribution act. Proper public administration should not permit an administrative agency such as the Commission to substitute its standards, or pursue its quest for flexibility without standards, in lieu of those established by Congress in the Act. It is wrong for the Commission to adopt a theory of attorney compensation which, in effect, forces unwanted and unsought attorney services upon Indians who did not contract for them but must pay for them anyhow, or to reward Oklahoma Miami

Indian counsel from Indiana Miami money when, at one stage of the underlying litigation in these cases, the same attorneys attempted to oust the Indiana Miami Indians as well as their attorneys from any recovery whatsoever on the underlying claims.

CONCLUSION

The undersigned respectfully petitions that a writ of certiorari be directed to the Court of Claims to review the consolidated dockets in the instant case.

Respectfully submitted,

ROBERT C. BELL, JR.

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New York, New York 10017

Attorney of Record for
David L. Kiley, and
Estate of Walter H. Maloney

May 18, 1973

APPENDIX A

BEFORE THE INDIAN CLAIMS COMMISSION

THE MIAMI TRIBE OF OKLAHOMA, et al., IRA S. GODFROY, et al., THE MIAMI INDIANS OF INDIANA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 255 Docket No. 124-C (Consolidated)
THE MIAMI TRIBE OF OKLAHOMA, et al., IRA S. GODFROY, et al., THE MIAMI INDIANS OF INDIANA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 256 Docket Nos. 124-D, 124-E and 124-F (Consolidated)

Decided: February 18, 1971

Appearances:

Louis L. Rochmes, Attorney for Sonnenschein, Levinson, Carlin, Nath and Rosenthal (Docket Nos. 255 and 256)

Robert C. Bell, Jr. Attorney for Kiley, Osborn, Kiley and Harker, Walter H. Maloney, Jr. and the Estate of Walter H. Maloney, Sr. (Docket Nos. 124-C, D, E and F)

W. Braxton Miller, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

THE AWARD AND APPORTIONMENT OF ATTORNEYS' FEES

Pierce, Commissioner, delivered the opinion of the Commission.

This matter is now before the Commission for the purpose of awarding and apportioning attorneys' fees. Two different cases are involved, although the plaintiffs are the same in each. And two separate sets of contract attorneys have been engaged in the prosecution of each case.

The first case consisting of one cause of action involved the consolidated Docket Nos. 255 and 124-C. Final judgment in that case was entered on December 3, 1968, in the amount of $66,966.00 (20 Ind. Cl. Comm. 97).

The second case involved three causes of action in consolidated Docket Nos. 256 and 124-D, E, and F. Final judgment in that case was also entered on December 3, 1968, but in the amount of $1,373,000.00 (20 Ind. Cl. Comm. 113).

Both of the judgments were entered in favor of the Miami Tribe of Oklahoma and the Miami Indians of Indiana jointly as representatives of the Miami Tribe.[1/] Each of the Miami plaintiffs was represented by its own contract attorney. The Miami Indians of Indiana were represented successively by Walter H. Maloney, Sr. (now deceased),[2/] Walter H. Maloney, Jr., and the firm of Kiley, Osborn, Kiley and Harker. The Miami Tribe of Oklahoma

1/ The Commission determined in Miami Tribe v. United States, 17 Ind. Cl. Comm. 427 (1966), that neither the Oklahoma Miamis nor the Indiana Miamis was the full successor to the original Miami Tribe, although both are entitled to represent it.

2/ Mr. Walter H. Maloney, Sr., died on November 14, 1967. His wife, Mrs. Madeline F. Maloney, and his son, Mr. Walter H. Maloney, Jr., are co-executors under the will which has been admitted to probate in the United States District Court for the District of Columbia.

was represented, under a separate contract, by a law firm now known as Sonnenschein, Levinson, Carlin, Nath and Rosenthal. The above named attorneys were also assisted from time to time by other associated counsel, as set forth in detail in our findings of fact entered herein.

The Indiana Miami's contract (No. 950) with Mr. Maloney and his successors provides that the compensation for attorney services shall not exceed ten percent of the amount recovered. The attorneys for the Indiana Miamis have rendered valuable services in the successful prosecution of their clients' claims. The attorneys participated in the trial, briefing and argument before the Commission in the claims involved in Docket Nos. 124-D, E, and F. On December 18, 1964, the Commission entered an interlocutory order determining defendant's liability, in part. Miami Tribe v. United States, 14 Ind. Cl. Comm. 374. The Commission on April 1, 1965, entered a partial final judgment with respect to claims under two of the treaties involved. Thereafter the parties reached a compromise settlement of the remaining issues and final judgment in Dockets 124-D, E and F was entered on December 3, 1968. All of the issues involved in the claim under Docket No. 124-C were resolved without a trial by a compromise settlement, and final judgment was entered on December 3, 1968. While the end result in the latter claim was achieved through settlement, it appears that no greater award would have resulted if the matter had been litigated. Settlement of that claim, and the remaining issues in the Docket Nos. 124-D, E, and F claims, resulted in a distinct and immediate benefit to the Indians while at the same time eliminating the delays and possible hazards of further

litigation. The Commission concludes that the attorneys for the Miami Indians of Indiana are entitled to a fee of ten percent for their services rendered in the prosecution of the claims under Docket Nos. 124-C, D, E, and F.

The Oklahoma Miamis' contract (No. 42017) with the Sonnenschein firm provides that the compensation for attorney services shall be ten percent of the amount recovered. Accordingly, the attorneys for the Miami Tribe of Oklahoma are entitled to a fee of ten percent for their services rendered in the prosecution of the claims under Docket Nos. 255 and 256.

The fees which are allowed in these cases are as follows:

Case	Judgment	Fee
Docket Nos. 255, and 124-C	$ 66,966.00	$ 6,696.60
Docket Nos. 256, and 124-D, E, and F	1,373,000.00	137,300.00
Total		$143,996.60

Since the attorneys have not agreed as to the proper division of their collective fees, they have presented the matter of apportionment to the Commission for determination. Following the rationale of the Court of Claims in The Sisseton and Wahpeton Bands or Tribes v. United States, 191 Ct. Cl. 459, 423 F. 2d 1386 (1970), it is clear that this Commission has jurisdiction to make such an apportionment.

The attorneys for the Indiana Miamis claim that the fees should be awarded in proportion to the amounts which they believe will be paid to their clients. Accordingly they contend that since there are 3,066 Indiana Miamis and 1,230 Oklahoma Miamis, the fees to be awarded to them should be $4,779.28

in Docket Nos. 255 and 124-C and $97,989.25 in Docket Nos. 256, 124-D, E and F. This would result in the remaining $1,917.32 in Dockets 255 and 124-C and the remaining $39,310.75 in Docket Nos. 256 and 124-D, E and F being awarded to the attorneys for the Oklahoma Miamis. There was, however, no division of the awards in these cases. The judgments were entered in favor of the Miami Tribe of Oklahoma and the Miami Indians of Indiana jointly as representatives of the Miami Tribe. It is a matter for Congress to determine how the awards are to be paid and how, if at all, any division of the moneys is to be achieved. By seeking to apportion their fees in accordance with what they believe will be the division of the awards, the attorneys for the Indiana Miamis are guessing at what might be the final benefit to their clients. Clearly an apportionment of fees cannot be made on such a speculative basis.

The attorneys for the Oklahoma Indians contend that the whole 10% fee should be awarded to them alleging that the sole effective legal work in the claims pertinent here was done by them. Alternatively, they argue that they are entitled to 85% of the fee and the Indiana Miami attorneys are entitled only to 15%. The latter proposal is based on a fee division agreement dated November 5, 1952, between the late Mr. Walter H. Maloney, Sr. and the late Mr. Edwin Morse of the Sonnenschein firm with respect to the award in consolidated cases in Dockets Nos. 67 and 124. That agreement is not pertinent here. It relates to work performed by the competing attorneys in Docket Nos. 67 and 124, which are different claims and are not involved with these cases. In addition we have no knowledge of any of the events

surrounding the execution of the 1952 agreement. The Sonnenschein firm by seeking the entire award, ignores the fact that the attorneys for the Indiana Miamis contributed legal services for which they should be compensated. See Red Lake and Pembina Tribe of Indians v. Little Shell Band, 173 Ct. Cl. 928, 355 F. 2d, 936 (1965).

Counsel for both Miami groups were diligent in representing and protecting the interests of their respective clients. However, the Sonnenschein firm carried the burden of the trial of the claims in Docket Nos. 256 and 124-D, E, and F. All of the exhibits on land value, which was the issue at the only trial held, were prepared and introduced into evidence by the Sonnenschein firm. The 19 exhibits introduced by Mr. Maloney concerned the relationship of his clients to the Miami Tribe as it existed on the treaty dates and other matters relating to a possible distribution of the prospective award. The Sonnenschein firm presented the plaintiffs' expert testimony on value and handled the cross examination of defendant's witnesses.

We have examined the records of the proceedings in the above-entitled cases and we have considered all of the matters which have been submitted by counsel in support of their fee applications. We have evaluated the services which each of the attorneys rendered, and we have considered the relative contribution which each set of lawyers made to the final results in these cases. We have concluded that the awarded fees should be apportioned on a basis of 70% of each fee to the law firm of Sonnenschein, Levinson, Carlin, Nath and Rosenthal and 30% of each fee to Madeline F. Maloney and

Walter H. Maloney, Jr., co-executors under the will of Walter H. Maloney, Sr., deceased; Walter F. Maloney, Jr.; and the law firm of Kiley, Osborn, Kiley and Harker.

The resulting fees are computed as follows:

Docket Nos. 255 and 124-C

Maloney et al.	$2,008.98
Sonnenschein firm	$4,687.62

Docket Nos. 256 and 124-D, E, and F

Maloney et al.	$41,190.00
Sonnenschein firm	$96,110.00

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner

24 Ind. Cl. Comm. 450

BEFORE THE INDIAN CLAIMS COMMISSION

THE MIAMI TRIBE OF OKLAHOMA, et al., IRA S. GODFROY, et al., THE MIAMI INDIANS OF INDIANA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 255 Docket No. 124-C (Consolidated)
THE MIAMI TRIBE OF OKLAHOMA, et al., IRA S. GODFROY, et al., THE MIAMI INDIANS OF INDIANA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 256 Docket Nos. 124-D, 124-E and 124-F (Consolidated)

Decided: February 18, 1971

FINDINGS OF FACT

The Commission, having considered the applications for allowance of attorneys' fees filed herein on August 18, 1969, and on October 7, 1969, and all the evidence received at the hearing on February 27, 1970, makes the following findings of fact:

1. On December 3, 1968, the Commission entered a final judgment approving a proposed compromise settlement in Docket Nos. 255 and 124-C (consolidated). The judgment, in the amount of $66,966.00, was in favor

of the Miami Tribe of Oklahoma, et al. and the Miami Indians of Indiana jointly as representatives of the Miami Tribe (20 Ind. Cl. Comm. 97). On that same date the Commission entered a final judgment approving a proposed settlement in Docket Nos. 256 and 124-D, E and F (consolidated). The judgment, in the amount of $1,373,000.00, was likewise in favor of the Miami Tribe of Oklahoma, et al. and the Miami Indians of Indiana jointly as representatives of the Miami Tribe (20 Ind. Cl. Comm. 113).

This Commission has determined in Miami Tribe v. United States, 17 Ind. Cl. Comm. 427, 431-432 (1966), that neither of the plaintiffs in Docket Nos. 256 and 124-D, E and F is the full successor to the original tribe, although both are entitled to represent it. As a result, the award in Docket Nos. 256 and 124-D, E and F was made to both tribes jointly as representatives of the Miami Tribe as it existed on the effective dates of the pertinent treaties. By the same reasoning, the judgment in Docket Nos. 255 and 124-C was awarded jointly to the same plaintiffs as representatives of the Miami Tribe.

2. The claims of the Miami Tribe of Oklahoma and the Miami Indians of Indiana in all of the above entitled claims were prosecuted by attorneys pursuant to the following contracts:

Miami Indians of Indiana

(a) On October 31, 1949, Contract No. 950, Symbol No. I-1-Ind. 42496, was entered into between the Miami Indians of Indiana and attorneys Walter H. Maloney, Sr. and Albert H. Sullivan. On June 10, 1950, prior to the Bureau of Indian Affairs' approval of said contract, Mr. Sullivan

withdrew as attorney under said contract. The Bureau of Indian Affairs approved the contract on June 7, 1951, for a period of ten years. The term of the contract was extended several times. The last extension, which was approved on August 17, 1970, was for five years beginning April 20, 1970.

On April 4, 1963, Mr. Walter H. Maloney, Sr., assigned his interest in the contract to Mr. Walter H. Maloney, Jr., but he retained his interest therein to remain as "of Counsel." The Commissioner of Indian Affairs approved the assignment on April 23, 1963. Mr. Walter H. Maloney, Jr. reassigned his interest in the contract to Mr. Walter H. Maloney, Sr. effective November 27, 1964. The reassignment was approved by the Commissioner of Indian Affairs on May 10, 1965. By approval of the Commissioner of Indian Affairs, also on May 10, 1965, Mr. Walter H. Maloney, Sr. then assigned his interest in the contract to the firm of Kiley, Osborn, Kiley and Barker, effective March 25, 1965. At the request of Kiley, Osborn, Kiley and Barker on April 23, 1968, the Commissioner of Indian Affairs approved the firm's association with Mr. Robert C. Bell, Jr. in connection with said contract.

Mr. Walter H. Maloney, Sr. died testate on November 14, 1967. His wife, Mrs. Madeline F. Maloney and his son, Mr. Walter H. Maloney, Jr., were appointed co-executors under the will which was admitted to probate in the United States District Court for the District of Columbia on December 14, 1967.

Miami Tribe of Oklahoma

(b) Contract No. 42017, Symbol No. I-1-Ind. between the Miami Tribe of Oklahoma and the law firm, then known as Sonnenschein, Berkson, Lautmann, Levinson and Morse, dated January 28, 1947, was approved by the Bureau of Indian Affairs May 10, 1948, for a period of ten years beginning with the date of approval, but subject to certain modifications. One modification required that changes in the firm by reason of admission of new partners, withdrawals, deaths and changes in the partnership would require the approval of the Commissioner of Indian Affairs. The approval by the Bureau was also made subject to a so-called Joint Efforts Agreement between the Sonnenschein firm and other firms, including the firm of Riegelman, Strasser, Schwartz and Spiegelberg, to provide for associate attorneys, if and when necessary, to assist in the prosecution of the claims. The principal contract was extended several times. The last extension was approved on April 18, 1963, for a period of ten years beginning May 10, 1963.

Mr. Edward P. Morse was designated by the Sonnenschein firm as attorney of record for the Oklahoma Miami clients. On January 1, 1957, Mr. Morse resigned as a general partner in the firm, but remained as a limited partner for the purpose of retaining his representation of the Indian clients. At that time the firm name was changed to Sonnenschein, Lautmann, Levinson, Reiser, Carlin and Kath. Mr. Morse continued to act as attorney of record for the Miami clients until his death on April 6, 1961. By order of this Commission dated April 27, 1961, Mr. Edwin Rothschild of the Sonnenschein firm became attorney of record on behalf of the Miami clients.

On April 18, 1963, the Area Director of the Bureau of Indian Affairs agreed to the change of the firm name to Sonnenschein, Levinson, Carlin, Nath and Rosenthal. With the approval of the same date, the Area Director eliminated the provision from said contract which required the approval of the Commissioner of Indian Affairs, with respect to further changes in the firm name.

Pursuant to the Joint Efforts Agreement, the Reigelmann firm established a Washington office to assist in the preparation and prosecution of the claims on behalf of the Miami Indians. Mr. Louis L. Rochres, then an associate of the Riegelmann firm, was designated to assist in this work. While Mr. Rochres has discontinued his association with the Reigelmann firm, he has continued to assist in the representation of the Miami Tribe of Oklahoma under the supervision and direction of the tribal attorneys.

3. Contract No. 950 between Mr. Maloney, his successors, and the Miami Indians of Indiana provides that the compensation for attorneys' services should not exceed ten percent of the amount recovered. Upon examination of the record of proceedings before this Commission in the claims under Docket Nos. 124-C, D, E, and F, we find that the attorneys for the Indiana Miamis have rendered valuable services in the successful prosecution of the claims. The attorneys participated in the trial, briefing and argument before the Commission in the claims involved in Docket Nos. 124-D, E, and F. On December 18, 1964, the Commission entered an interlocutory order determining defendant's liability, in part. Miami Tribe v. United States, 14 Ind. Cl. Comm. 374 (1964). The Commission, on

April 1, 1965, entered a partial final judgment with respect to claims under two of the treaties involved. Thereafter the parties reached a compromise settlement of the remaining issues and final judgment was entered on December 3, 1968 (20 Ind. Cl. Comm. 113). All of the issues involved in the claim under Docket Nos. 255 and 124-C were resolved by a compromise settlement and final judgment was entered on December 3, 1968 (20 Ind. Cl. Comm. 97). The attorneys for the Indiana Miamis participated in the required settlement procedures, as set forth in detail in the Commission's findings of fact on the compromise settlements in both cases.

4. The Oklahoma Miamis contract (No. 42017) with the Sonnenschein firm provides that the compensation for attorneys' services shall be ten percent of the amount recovered.

5. In response to the Commission's request for comments on the August 18, 1969, fee application of the attorneys for Docket Nos. 124-C, D, E and F, the Department of Justice took no position with respect to the amount of the fee, provided that the fees did not exceed the statutory 10% of the awards. Enclosed with the letter from the Justice Department with respect to the same application was a memorandum from the Commissioner of Indian Affairs, dated September 10, 1969, to the Solicitor of the Department of Interior in which he did not make any recommendation with respect to the fee application. After the attorneys in Docket Nos. 255 and 256 filed their fee application on October 7, 1969, the same comments by the Department of Justice and the Commissioner of Indian Affairs were made respecting that fee application.

6. The Commission finds that the attorneys for the Miami Indians of Indiana are entitled to a fee of ten percent as compensation for services rendered in the prosecution of the claims under Docket Nos. 124-C, D, E and F.

The attorneys for the Miami Tribe of Oklahoma are entitled to a fee of ten percent as compensation for services rendered in the prosecution of the claims under Docket Nos. 255 and 256.

7. Since both sets of attorneys have been found to be entitled to a fee of 10% for their respective services rendered, the fees which are allowed in these cases are as follows:

Case	Judgment	Fee
Docket Nos. 255 and 124-C	$ 66,966.00	$ 6,696.60
Docket Nos. 256 and 124-D, E, and F	$1,373,000.00	$137,300.00
Total		$143,996.60

8. The attorneys have not agreed as to the proper division of the fee awards but have submitted the question to the Commission for determination.

Counsel for both Miami groups were diligent in representing and protecting the interests of their respective clients. However, the Sonnenschein firm carried the burden of the trial of the claims in Docket Nos. 256 and 124-D, E, and F. All of the exhibits on value, which was the issue at the trial, were prepared and introduced into evidence by the Sonnenschein firm. The 19 exhibits introduced by Mr. Maloney concerned the relationship of his clients to the Miami Tribe as it existed on the treaty dates and other matters relating to a possible distribution of the prospective awards. The Sonnenschein firm presented the plaintiffs' expert

testimony on value and handled the cross examination of defendant's witnesses.

Upon consideration of the services rendered by each set of attorneys in these cases and the relative contribution which each made to the final results in these cases, we conclude that the awarded fees should be apportioned on a basis of 70% of each fee to the law firm of Sonnenschein, Levinson, Carlin, Nath and Rosenthal and 30% of each fee to Madeline F. Maloney and Walter H. Maloney, Jr., co-executors under the will of Walter H. Maloney, Sr., deceased; Walter H. Maloney, Jr.; and the law firm of Kiley, Osborn, Kiley and Barker.

9. The Commission finds that the below named parties are entitled to the indicated sums as payment in full of the attorneys' fees for services rendered in the prosecution of the claims in the matter of the subject cases:

1. To Madeline F. Maloney and Walter H. Maloney, Jr., co-executors under the will of Walter H. Maloney, Sr., deceased; Walter H. Maloney, Jr.; and the law firm of Kiley, Osborn, Kiley and Barker

Docket Nos. 255 and 124-C (consolidated)	$ 2,008.98
Docket Nos. 256 and 124-D, E, and F (consolidated)	$41,190.00

2. To the law firm of Sonnenschein, Levinson, Carlin, Nath and Rosenthal

Docket Nos. 255 and 124-C (consolidated)	$ 4,687.62
Docket Nos. 256 and 124-D, E, and F (consolidated)	$96,110.00

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE MIAMI TRIBE OF OKLAHOMA, et al., IRA S. CONDROY, et al., THE MIAMI INDIANS OF INDIANA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 255 Docket No. 124-C (Consolidated)
THE MIAMI TRIBE OF OKLAHOMA, et al., IRA S. CONDROY, et al., THE MIAMI INDIANS OF INDIANA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 256 Docket Nos. 124-D, 124-E and 124-F (Consolidated)

ORDER AWARDING AND APPORTIONING ATTORNEYS' FEES

The applications for allowance of attorneys' fees in these cases having been duly considered and the Commission having filed its findings of fact this day, which findings of fact are hereby made a part of this order,

IT IS ORDERED THAT:

(a) There shall be awarded as attorneys' fees for all services rendered by all the contract attorneys in Docket Nos. 255 and 124-C (consolidated) the sum of $6,696.60, which is ten percent of the final award entered in favor of the plaintiffs herein on December 3, 1968 (20 Ind. Cl. Comm. 97);

(b) There shall be awarded as attorneys' fees for all services rendered by all the contract attorneys in Docket Nos. 256 and 124-D, E and F (consolidated), the sum of $137,300.00 which is ten percent of the final award entered in favor of the same plaintiffs herein on December 3, 1968 (20 Ind. Cl. Comm. 113);

(c) The attorneys' fees shall be apportioned as follows:

1. To Madeline F. Maloney and Walter H. Maloney, Jr., co-executors under the will of Walter H. Maloney, Sr., deceased; Walter H. Maloney, Jr.; and the law firm of Kiley, Osborn, Kiley and Barker

Docket Nos. 255 and 124-C (consolidated)	$ 2,008.98
Docket Nos. 256 and 124-D, E, and F (consolidated)	$41,190.00

2. To the law firm of Sonnenschein, Levinson, Carlin, Roth and Rosenthal

Docket Nos. 255 and 124-C (consolidated)	$ 4,687.62
Docket Nos. 256 and 124-D, E, and F (consolidated)	$96,110.00

Dated at Washington, D. C., this 18th day of February, 1971.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

APPENDIX B

Public Law 92-309
92nd Congress, H. R. 5199
June 2, 1972

An Act

To provide for the disposition of funds appropriated to pay judgments in favor of the Miami Tribe of Oklahoma and the Miami Indians of Indiana in Indian Claims Commission dockets numbered 255 and 124-C, dockets numbered 256, 124-D, E, and F, and dockets numbered 131 and 253, and of funds appropriated to pay a judgment in favor of the Miami Tribe of Oklahoma in docket numbered 251-A, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the funds appropriated by the Acts of July 22, 1969 (83 Stat. 49), and January 8, 1971 (84 Stat. 1981), to pay judgments awarded to the Miami Tribe of Oklahoma and the Miami Indians of Indiana in Indian Claims Commission dockets numbered 255 and 124-C, dockets numbered 256, 124-D, E, and F, and dockets numbered 131 and 253, and to pay a judgment awarded to the Miami Tribe of Oklahoma in docket numbered 251-A, together with interest thereon, after payment of attorney fees and litigation expenses, shall be distributed as provided in this Act. Miami Indians of Indiana and Oklahoma. Judgment funds, distribution.

SEC. 2. The Secretary may make appropriate withdrawals from the judgment funds and interest thereon, using interest funds first, to pay costs incident to carrying out the provisions of this Act. 86 STAT. 199 / 86 STAT. 200

SEC. 3. The Secretary of the Interior shall bring current to the date of this Act the roll prepared pursuant to section 4 of the Act of October 14, 1966 (80 Stat. 909), by (a) adding the names of persons living on the date of this Act who were eligible for enrollment under said section 4 but were not enrolled, (b) by adding the names of children born to enrollees on or prior to the date of this Act and who are living on said date, (c) by adding the names of children born to persons who were eligible for enrollment under said section 4 but who were not enrolled, regardless of whether such persons are living or deceased on the date of this Act, provided said children of such persons are living on the date of this Act, and (d) by deleting the names of persons who are deceased as of the date of this Act. Ancestry roll. 25 USC 1114.

SEC. 4. An application for addition of a name to the roll pursuant to section 3 of this Act must be filed with the area director of the Bureau of Indian Affairs, Muskogee, Oklahoma, on forms prescribed for that purpose. The determination of the Secretary regarding the eligibility of an applicant shall be final. Enrollment application.

SEC. 5. On completion of the roll by the Secretary of the Interior, the balance of the funds appropriated to satisfy the judgments in dockets numbered 255 and 124-C, dockets numbered 256, 124-D, E, and F, and dockets numbered 131 and 253, and interest accumulated thereon, shall be distributed equally to the individuals enrolled.

SEC. 6. The funds on deposit in the Treasury of the United States to the credit of the Miami Tribe of Oklahoma that were appropriated by the Act of July 22, 1969 (83 Stat. 49), to pay a judgment by the Indian Claims Commission in docket numbered 251-A, together with the interest thereon, after payment of attorney fees and expenses, may be advanced or expended for any purpose that is authorized by the tribal governing body of the Miami Tribe of Oklahoma, and approved by the Secretary of the Interior.

SEC. 7. (a) Except as provided in subsection (b) of this section, the Secretary of the Interior shall distribute a per capita share payable to a living enrollee directly to such enrollee, and shall distribute a per capita share payable to a deceased enrollee directly to his heirs or legatees upon proof of death and inheritance satisfactory to the Secretary, whose findings upon such proof shall be final and conclusive. Per capita payments.

86 STAT. 200

Minors.

(b) Sums payable to enrollees or their heirs or legatees who are less than eighteen years of age or who are under a legal disability shall be paid in accordance with such procedures, including the establishment of trusts, as the Secretary of the Interior determines appropriate to protect the best interest of such persons.

Tax exemption.

SEC. 8. None of the funds distributed under the provisions of this Act shall be subject to Federal or State income taxes.

Rules and regulations.

SEC. 9. The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of this Act, including the establishment of deadlines.

Approved June 2, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 92-962 (Comm. on Interior and Insular Affairs).
SENATE REPORT No. 92-778 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 118 (1972):
Apr. 17, considered and passed House.
May 5, considered and passed Senate, amended.
May 18, House concurred in Senate amendment.

APPENDIX C

In the United States Court of Claims

(Decided April 11, 1972)

Appeal No. 6-71

Ind. Cl. Comm. Docket Nos.
124-C, D, E, F/255, 256

IRA SYLVESTER GODFROY, ET AL., ETC. v. THE UNITED STATES

Appeal No. 8-71

Ind. Cl. Comm. Docket Nos.
124-D, E, F/256

THE MIAMI TRIBE OF OKLAHOMA, ET AL., ETC. v. THE UNITED STATES

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17 Ind. Cl. Comm. 427
20 Ind. Cl. Comm. 97
20 Ind. Cl. Comm. 113
24 Ind. Cl. Comm. 450

Robert C. Bell, attorney of record for David L. Kiley and Estate of Walter H. Maloney, Sr. (Appeal No. 6-71). *Walter H. Maloney, Jr.*, and *Kiley, Osborn, Kiley* and *Harker*, of counsel.

Louis L. Rochmes, attorney of record (Appeal No. 8-71) *Edwin Rothschild* and *Sonnenschein, Levinson, Carlin, Nath and Rosenthal*, of counsel.

461-466--72

W. *Braxton Miller*, with whom was *Assistant Attorney General Kent Frizzell*, for the United States.

Before COWEN, *Chief Judge*, LARAMORE and DURFEE, *Senior Judges*, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

SKELTON, *Judge*, delivered the opinion of the court:

The appeals now before the court are two separate appeals from a decision of the Indian Claims Commission following their decision allowing and apportioning attorney's fees based on recoveries for the Miami Tribe of Indians. The problem arises because there are two identifiable tribes that are qualified to retain attorneys pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70n (1970), but only one joint award was to the two tribes as successors to the original Miami Indian Tribe.[1] One of the descendant tribes, the Oklahoma Miamis, by their authorized attorneys, filed claims with the Indian Claims Commission which were designated as Docket Nos. 255 and 256. These claims included the same lands in Northern and Central Indiana that were covered by claims filed on behalf of the other faction of the original Miami Tribe, the Miami Indian Tribe of Indiana. The cases filed on behalf on the Indiana Tribe were designated as Docket Nos. 124-C, 124-D, 124-E and 124-F. Thus, having six separate cases with a question common to all, the Indian Claims Commission consolidated the cases into two separate dockets. The first, with a combined Docket No. of 124-C/255 arose from the cession of a reservation under a treaty made in 1828 and was finally resolved through settlement of the claim for the sum of $66,966 (20 Ind. Cl. Comm. 97 (1968)). The second case, with a consolidated Docket No. of 124-D, E, F/256 arose from the cession of 13 reservations by the Miami Tribe under three different treaties, one made in 1834, effective in 1837, one in 1838 and the other in 1840.

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[1] The Indian Claims Commission decided in *Miami Tribe v. United States*, 17 Ind. Cl. Comm. 427 (1966), that neither faction of the Miami Tribe was the full successor to the original tribe but both are entitled to represent it.

These cases were also finally determined by settlement following a trial on the merits for the final amount of $1,373,000 (20 Ind. Cl. Comm. 113 (1968)).

In the prosecution of these claims the Miami Tribe of Oklahoma was represented, pursuant to Contract No. 42017, which was approved by the Bureau of Indian Affairs May 10, 1948, by the law firm of Sonnenschein, Levinson, Carlin, Nath & Rosenthal, but individually by Mr. Louis L. Rochmes. The Miami Tribe of Indiana was originally represented by Walter H. Maloney, Sr. by virtue of Contract No. 950 which was approved by the Bureau of Indian Affairs on June 7, 1951. Thereafter, the contract and representation was partially assigned to Walter H. Maloney, Jr. (with Walter H. Maloney, Sr. retaining "of counsel" rights) and the law firm of Kiley, Osborn, Kiley & Harber who in turn associated with Robert C. Bell, Jr.

Following the successful prosecution of the Indian claims, both sets of attorneys filed with the Indian Claims Commission for approval of their fees. Both sets of lawyers were allowed the maximum 10 percent fee but no agreement could be reached between the lawyers as to how they should be divided. Therefore, application was made to the Indian Claims Commission for a decision as to a proper division of the fee awards. The Commission found, by their opinion of February 18, 1971, that both sets of attorneys had valid agreements with their respective tribes for the maximum 10 percent fee and that both were diligent in representing and protecting the interest of their respective clients. (24 Ind. Cl. Comm. 450 (1971)). They, therefore, allowed the fee of $6,696.60 for Docket Nos. 255 and 124-C and a fee of $137,300 for Docket Nos 256 and 124-D, E, and F. It was further decided that upon consideration of services rendered and the relative contribution made by each that the fees be apportioned on a basis of 70 percent of each fee to the Sonnenschein, Levinson, Carlin, Nath & Rosenthal firm and 30 percent of each fee to the attorneys for the Miami Tribe of Indiana. From that decision the Oklahoma Tribe attorneys filed appeal No. 6-71 wherein they seek an increase of the allocation with reference to Docket Nos. 124-D, E and F/256. The attorneys for Miami Tribe of Indiana appeal in No. 8-71 seeking ad-

justment of the allocation in respect to both the above Docket No. and 124–C/255.

We have concluded that the decision of the Indian Claims Commission made a disproportionate division of attorney fees between the two groups of attorneys in this case, and should be reversed. The decision is contrary to the contracts and the Indian Claims Commission Act, is at variance with the findings of the Commission, does violence to the rights of the attorneys representing the Miami Indians of Indiana by awarding fees rightfully belonging to them to the Oklahoma attorneys who are not legally entitled to them, and violates the rights of the Indiana Indians by imposing upon them the services of the Oklahoma attorneys whom they did not employ and with whom they have no privity of contract, and awards fees to such attorneys that belong to the Indiana Indians themselves if not paid to their attorneys. Furthermore, the decision is arbitrary and is not supported by substantial evidence, is unjust and inequitable, all as shown below.

I

The Contracts

We begin with the contracts which initiated the litigation. We will refer to the attorneys representing the Miami Indians of Indiana as the Indiana attorneys, and to such Indians as the Indiana Indians. In like manner, we will refer to the attorneys representing the Miami Indians of Oklahoma as the Oklahoma attorneys and to such Indians as the Oklahoma Indians.

The contract of the Oklahoma attorneys was made January 28, 1947, and it provides, among other things, as follows:

> THIS AGREEMENT, made and entered into * * *, by and between Harley T. Palmer, Chief * * * [and others] *acting for and on behalf of the Miami Tribe of Oklahoma*, party of the first part, and Sonnenchein, * * * [and others], attorneys at law, parties of the second part:
>
> WITNESSETH, That the party of the first part *on behalf of said Miami Tribe of Oklahoma* under the authority vested therein by resolution of a council of said Indians adopted on the 28th day of January, 1947, * * *

> contracts with, retains and employs the parties of the second part as attorneys * * *.
>
> * * * * *
>
> It is agreed that the compensation of the parties of the second part for the services to be rendered under the terms of this contract is to be *wholly* contingent upon a recovery *for the tribe*. The parties of the second part shall receive as such compensation ten per centum (10%) of any and all sums recovered or procured, through efforts, in whole or in part, *for said Indians*, * * *. [Emphasis supplied.]
>
> * * * * *

The contract was signed by the Chief, Second Chief, and a Councilman, as "Tribal Delegates," and by a member of said law firm.

The Honorable William M. Thomas, Judge of the Seventh Judicial District Court of Oklahoma, put a certificate on the contract, certifying that:

> * * * Harley T. Palmer, * * * [and others] * * * entered into, signed and executed * * *, *for and on behalf of the Miami Tribe of Oklahoma*, the contract * * *; that, as then stated to me, the *Miami Tribe of Oklahoma* are the parties on the one side, and Sonnenschein * * * [and others], attorneys at law, on the other. [Emphasis supplied.]

Also attached to the contract is a certificate of Honorable William J. Campbell, Judge of the U.S. District Court of the Northern District of Illinois, in which he certified that Edward P. Morse, a member of the law firm of Sonnenschein (et al.) entered into, signed, and executed the contract for and on behalf of said firm and:

> * * * [T]hat, as then stated to me, *the Miami Tribe of Oklahoma* is the party interested on the one side, and the said attorneys at law, Sonnenschein [et al.], the parties interested on the other. [Emphasis supplied.]

Attached to the contract is a copy of a resolution adopted by the Miami Tribe of Oklahoma at a meeting of that tribe, authorizing the execution of the contract with said attorneys, and appointing Chief Harley T. Palmer and others as delegates to execute the contract *for and on behalf of the Miami Tribe of Oklahoma*.

This contract was approved by William Zimmerman, Jr., Acting Commissioner of Indian Affairs of the Department of Interior. It is the sole authority of the Oklahoma attorneys to act in these cases.

We turn now to the contract of the Indiana attorneys. This document was executed on October 31, 1949, by and between the Miami Indians of Indiana, acting by and through its authorized delegates Ira Sylvester Godfroy (et al.) as party of the first part, and Walter H. Maloney (et al.) attorneys at law, parties of the second part. The contract provided, among other things:

> That the party of the first part, * * * under authority vested by resolution adopted by a majority vote of said Indians, assembled in special session on July 16, 1949, a copy of which is hereto attached * * * hereby contracts with, retains and employs the parties of the second part as attorneys in the matters hereinafter mentioned and set out, * * *.
>
> * * * * *
>
> * * * The parties of the second part shall receive as such compensation ten per centum (10%) of any and all sums recovered or procured through efforts, in whole or in part, *for said party of the first part*, * * *. [Emphasis supplied.]
>
> * * * * *

Attached to the contract is a certificate of Henry S. Bailey, Judge of the Circuit Court of Miami County, Indiana, in which he certified that Ira Sylvester Godfroy (et al.):

> * * * [T]he duly delegated representatives *on behalf of the Miami Indians of Indiana* * * * entered into, signed and executed * * * *for and on behalf of the Miami Indians of Indiana*, the contract * * * and, as stated to me, said delegates, acting for and on behalf of themselves *and the Miami Indians of Indiana*, is the party interested on the one side, and Walter H. Maloney * * * [et al.] are the parties interested on the other side. [Emphasis supplied.]

Also attached to the contract is a certificate of James R. Kirkland, Judge of the District Court of the District of Columbia in which he certified that Walter H. Maloney, in his presence, executed the contract, and:

> * * * [A]s stated to me, *The Miami Indians of Indiana*, acting by and through its duly authorized agents, Ira

> Sylvester Godfroy * * * [et al.] is the party interested on the one side and Walter H. Maloney is the party interested on the other. [Emphasis supplied.]

Attached to the contract was the following resolution in pertinent part:

> RESOLVE that *the Miami Indians of the State of Indiana* assembled in special session this 16 day of July, 1949, select by a majority vote of all members Ira Sylvester Godfroy * * * [et al.] to sign contracts *for and on behalf of themselves and all others, legal members of the Miami Tribe of the State of Indiana*, for the purpose of prosecuting claims for all members of said Miami Tribe. * * * [Emphasis supplied.]

This contract was approved by D. S. Myer, Commissioner of Indian Affairs, with minor changes, one of which was to change the attorney fee to "not to exceed" 10 percent of any and all sums recovered or procured for said party of the first part (the Miami Indians of Indiana).

It is clear from these contracts that the Oklahoma attorneys were authorized to represent *only* the Oklahoma Indians and had no authority whatever to represent the Indiana Indians. In like manner, the Indiana attorneys were authorized to represent *only* the Indiana Indians and had no authority whatever to represent the Oklahoma Indians.

In due time, the two groups of attorneys filed separate suits for their respective clients pursuant to their contracts. The cases were consolidated for trial by the I.C.C. on December 19, 1958.

II

The Indian Claims Commission Act Limits the Authority of the I.C.C. To Fix Attorney Fees

The Indian Claims Commission Act (25 U.S.C. § 70n (1970)) provides as follows:

> § 70n. Attorneys of claimants; selection, practice and fees; Attorney General to represent United States; compromise of claims.
>
> Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or

> attorneys at law, *of its own selection*, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, *unless* the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, *be fixed by the Commission* at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, *finds to be adequate compensation for services rendered and results obtained*, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim: *but the amount so fixed by the Commission*, exclusive of reimbursements for actual expenses, *shall not exceed 10 per centum of the amount recovered* in any case. * * * [Emphasis supplied.]

It will be observed that the Act does not authorize the I.C.C. to fix attorney fees if the fees are stipulated in an approved contract. It is only where the fees are not so stipulated that the I.C.C. can determine them. This is because the Act provides that *unless* the fees are stipulated in an approved contract, the Commission shall fix the fees. The converse of this provision deprives the Commission of this authority if the fees are stipulated in the contract.

Applying this statute to the case before us, it appears that the Commission had no authority to fix the fees of the Oklahoma attorneys because their approved contract stipulated that their fee would be 10 percent of the amount recovered for the Oklahoma Indians. According to the terms of the Act, this fee could not be increased nor decreased by the Commission. Of course, the attorneys must render some services in order to get their fee. *See Red Lake and Pembina Bands* v. *United States*, 173 Ct. Cl. 928, 355 F. 2d 936 (1965). Therefore, when the Commission increased the attorney fee of the Oklahoma attorneys above 10 percent of the amount they recovered for the Oklahoma Indians by awarding such attorneys an additional fee based on the recovery of the Indiana Indians, it exceeded its authority and acted contrary to the Act.

Furthermore, even if it could be assumed arguendo that as a general proposition the Commission had the authority

to increase the attorney fees of the Oklahoma attorneys, it acted directly contrary to another provision of the Act by increasing such fees above 10 percent of the amount recovered by them for their clients. The Act provides:

> * * * [T]he amount [of attorney fees] so fixed by the Commission * * * shall not exceed 10 per centum of the amount recovered in any case. * * *

The words in the Act "shall not exceed 10 per centum" clearly means "shall not exceed 10 per centum of the amount recovered *by the attorneys for their clients* in any case."

The situation with respect to the fee of the Indiana attorneys is somewhat different. It will be remembered that their contract provided that their fee would be "not more than" 10 percent of the amount recovered for the Indiana Indians. Under these circumstances, the Commission had the authority to fix their fees at an amount less than 10 percent of said recovery. That was done here. The amount of the reduction, however, belonged to the Indiana Indians. In the case of *Sisseton & Wahpeton Bands* v. *United States*, 191 Ct. Cl. 459, 423 F. 2d 1386 (1970), this court said:

> * * * The United States holds the sums awarded in trust for the Indians, and the [attorney] fees are to come from those funds. * * * [Id. at 470, 423 F. 2d at 1391.]

Consequently, the Commission had no authority to take any part of these trust funds from the Indiana Indians and award them as increased fees to the Oklahoma attorneys who had no contract with the Indiana Indians and had no authority to represent them. The Indiana Indians would have just cause for complaint if the decision of the Commission should be carried out and trust funds of such Indians are paid to the Oklahoma attorneys as fees.

III

The Indiana Indians had the right under the Indian Claims Commission Act to Select their own Attorneys

Section 70n of the Indian Claims Commission Act, quoted above, provides:

> Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the

> presentation of claims before the Commission an attorney or attorneys at law, *of its own selection*, * * *. [Emphasis supplied.]

In this case, the Indiana Indians selected and retained the Indiana attorneys to represent them. They did not select nor retain the Oklahoma attorneys to represent them. Yet, the decision of the Commission forces the services of the Oklahoma attorneys upon them and pays such attorneys' fees with funds that belong either to the Indiana attorneys or to the Indiana Indians. This has deprived these Indians of their right to select their own attorneys which is guaranteed to them by the Act.

IV

The Disproportionate Award of Attorney Fees by the Commission conflicts with its findings

This is not a case like *Red Lake and Pembina Bands* v. *United States*, *supra*, where an attorney was denied attorney fees because he had not rendered any services at all. On the contrary, in the present case the facts show that the Indiana attorneys rendered valuable and diligent services for over twenty years, including conferences with the Indians, research, preparing and filing petitions and other pleadings, introduction of evidence, participation in hearings and trials, filing briefs, presenting oral arguments, and representing their clients in an able manner for more than two decades. For these reasons, the *Red Lake* case is not applicable.

The above facts are shown by the findings of the Commission as follows:

> 3. * * * Upon examination of the record of proceedings before this Commission in the claims under Docket Nos. 124–C, D, E, and F, we find that the attorneys for the Indiana Miamis have rendered valuable services in the successful prosecution of the claims. The attorneys participated in the trial, briefing and argument before the Commission in the claims involved in Docket Nos. 124–D, E, and F. * * * The attorneys for the Indiana Miamis participated in the required settlement procedures, [of Docket Nos. 255 and 124–C] as set forth in detail in the Commission's findings of fact on the compromise settlements in both cases.
>
> * * * * *

6. The Commission finds that the attorneys for the Miami Indians of Indiana are entitled to a fee of ten percent as compensation for services rendered in the prosecution of the claims under Docket Nos. 124–C, D, E and F.

* * * * *

8. * * *

Counsel for both Miami groups were diligent in representing and protecting the interests of their respective clients. * * * [24 Ind. Cl. Comm. 450, 461–63 (1970).]

In *The Award and Apportionment of Attorneys' Fees*, the Commission stated:

* * * The attorneys for the Indiana Miamis have rendered valuable services in the successful prosecution of their clients' claims. The attorneys participated in the trial, briefing and argument before the Commission in the claims involved in Docket Nos. 124–D, E, and F. * * * The Commission concludes that the attorneys for the Miami Indians of Indiana are entitled to a fee of ten percent for their services rendered in the prosecution of the claims under Docket Nos. 124–C, D, E, and F.

* * * * *

Counsel for both Miami groups were diligent in representing and protecting the interests of their respective clients. * * * [24 Ind. Cl. Comm. 450, 452–53, 455 (1970)].

These findings and conclusions of the Commission show without question that the Indiana attorneys rendered valuable and conscientious services for the Indiana Indians, and by reason thereof, are entitled to their fee of 10 percent of the amount recovered for their clients. In fact, the Commission so found. Notwithstanding these findings and conclusions, the Commission arbitrarily denied them the 10 percent fee and allowed them only 30 percent of the total 10 percent fee in the sum of $143,996.60 and allowed the Oklahoma attorneys a fee of 70 percent of this amount.

The reasoning of the Commission was that the Oklahoma attorneys took the lead in the case and introduced all the exhibits on land value, which was the issue in the case. The Indiana attorneys say that to facilitate an orderly trial they allowed the Oklahoma attorneys to proceed first, not realizing or even suspecting that by doing so the Oklahoma attorneys

would later claim the entire attorney fee. Furthermore, the Indiana attorneys say that no witness on value was put on the stand by the Oklahoma attorneys and support this by the following statement of one of such attorneys during the trial.

> We have deliberately not put on a so-called expert to guess at what the value of the Indian lands were 150 years ago or about 110 years ago it is, * * * because we know that this Commission is as well qualified to determine from the evidence, historical, geographical and economic evidence, before it as any real estate man might be, to set a value. [Tr. 127, June 29, 1959.]

To justify its decision, the Commission said:

> * * * The Sonnenschein firm [Oklahoma attorneys] presented the plaintiffs' expert testimony on value * * *. [24 Ind. Cl. Comm. 450, 463-64.]

This statement does not appear to be correct. The Commissioners who made the findings of fact in the case found:

> 33. In the course of the trial, *petitioners* presented one witness, Mr. John Long, who testified as an expert in the fields of economic history and geography. * * * The gist of Mr. Long's testimony was that the area of the subject tracts was very favorable for agriculture, that the land was fertile and attractive to settlers, and that the lands were in demand at a good price. *He gave no opinion as to the fair market value of the subject lands, nor did he submit a written report.* [Emphasis supplied.] [14 Ind. Cl. Comm. 375, 429, 430.] [Finding 33.]

This finding is significant for two reasons. In the first place it shows that the Commissioners considered that Mr. Long was a witness of both the Indiana and Oklahoma Tribes and not of the Oklahoma Tribe alone, because they stated that the *petitioners* presented one witness. In the second place, this finding shows that the present Commission was mistaken in saying the Oklahoma attorneys presented "the plaintiff's testimony on value." Actually, the record shows that only the defendant presented expert witnesses on value. The Commission found:

> Defendant presented the testimony of several expert witnesses. [14 Ind. Cl. Comm. 375, 430.]

These experts were Dr. Theodore Carlson, Mr. Thomas M. Bushnell, and Dr. Homer Hoyt. Dr. Hoyt was an expert

appraiser. (See 14 Ind. Cl. Comm. 375, 431.) The Commission determined value from these defense witnesses, along with historical, geographic, economic, climatic, and other public information. The Oklahoma attorneys could hardly be given credit for this evidence.

The Indiana attorneys point out that the 77 exhibits on value introduced by the Oklahoma attorneys were duplicates of exhibits introduced in evidence in a prior case (Docket 67/124) in which both groups of attorneys participated. The cost of these exhibits was paid jointly by the Indiana and Oklahoma Indians. Both had a property right in them. Also, they were public records once they were put in evidence in the prior case. These facts were admitted by the Oklahoma attorneys in their proposed finding number 5 of their application for fees when they said:

> * * * [T]here were received in evidence on behalf of the petitioners 77 exhibits, all of which had previously been introluced by the parties in Docket 67.

This was also admitted by the Oklahoma attorneys on page 6 of their brief.

Obviously the Indiana attorneys could have introduced copies of the same documents and would no doubt have done so had they known the Oklahoma attorneys were going to claim the entire attorney fee because of these exhibits. They point out they did introduce 69 exhibits (not 19 as stated by the Commission).

In our opinion, this evidence falls far short of being substantial evidence that will support the decision of the Commission in apportioning the attorney fees. Almost everyone who has ever practised law has sooner or later found himself in a case where he has been associated with other attorneys in a common cause. Someone has to take the lead in the case. Only one lawyer can talk or proceed with the evidence at one time. In such instances, the attorneys agree as to what evidence will be introduced and which attorney will take the lead and proceed. But it would be an unheard of occurrence for the lawyer who takes the lead and puts on the evidence to claim the entire attorney fee. This is contrary to the universal custom and practice of lawyers everywhere. It is incredible that the Oklahoma attorneys would claim the

entire attorney fee, or any amount above the 10 percent of the recovery for their clients as specified in their contract.

The entire membership of the Commission changed after the trial in 1959. The members of the present Commission who apportioned and fixed the attorney fees did not hear the evidence nor participate in the trial on the merits.[2] Consequently, they are in no better position to decide what the lawyers did nor the fee they are entitled to than we are. All they have to go by is the cold record itself and that is available to us also. In our opinion, the record considered as a whole does not support the decision of the Commission.

The Commission has found and concluded that the Indiana attorneys rendered valuable services in the successful prosecution of the claims of their clients, and that they were diligent in representing and protecting the interests of their clients, and that they are entitled to a fee of 10 percent for their services rendered. Yet, in the face of these findings, the Commission denied them the 10 percent attorney fee. This decision conflicts with the findings of the Commission and is arbitrary.

Furthermore, it should be noted that the consolidation of the cases by the Commission was solely for the purpose of the trial and was for the convenience of the Commission as well as the parties. The consolidation did not consolidate nor merge the Indiana and Oklahoma Tribes. They remained separate and distinct tribes or bands of identifiable Indians. They could not be merged into one tribe by the Commission. As a matter of fact, the Indiana Indians could not be members of the Oklahoma Tribe because the latter was organized as an agricultural co-operative under an Oklahoma Indian Welfare Act (49 Stat. 1967, 25 U.S.C. § 501 (1964)), which was restricted to the Miami Indians residing in Oklahoma. The Commission so held in 14 Ind. Cl. Comm. 375, 440, when it said:

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[2] The members of the Indian Claims Commission who made the Findings of Fact in this consolidated case were Arthur V. Watkins, William Holt, and T. Harold Scott. See their Findings of Fact and Interlocutory Order in 14 Ind. Cl. Comm. 375, 483.

The membership of the Commission that made the award and apportionment of attorneys' fees, findings of fact and the order awarding such fees on Feb. 18, 1971, was completely different and was composed of John T. Vance, Jerome K. Kuykendall, Richard W. Yarborough, Margaret H. Pierce, and Brantley Blue. See 24 Ind. Cl. Comm. 450, 467.

> As applied to the case in issue, *the Miami Indians of Indiana*, petitioner in Docket Nos. 124-D, 124-E, and 124-F, *are not members of the Miami Tribe of Oklahoma nor can they become members, according to the restrictions placed on membership by the constitution and by-laws of the Miami Tribe of Oklahoma.* [Emphasis supplied.]

Also, the consolidation of the cases for trial by the Commission did not merge the contracts of the attorneys into one contract. The Commission had no power nor authority to effect such a merger. Consequently, the two groups of attorneys continued to represent their respective clients in accordance with their contracts and are entitled to be paid fees as provided in the contracts for the valuable and diligent services the Commission found they rendered.

V

The Attorney Fees should be divided equally between the Indiana Attorneys and the Oklahoma Attorneys

The Commission has allowed an attorney fee in the total sum of $143,996.60. The Indiana attorneys say that they should receive an attorney fee of 70.1 percent of this total fee, which 70.1 percent amounts to $102,768.53. They support this claim by showing that the roll of the Miami Indians ordered by Public Law 89-659 of October 14, 1966 (80 Stat. 909), was completed and approved by the Secretary of Interior on June 25, 1969, and showed 4,296 enrollees, 1,230 being Oklahoma Miamis and 3,066 being Indiana Miamis. The Indiana attorneys argue that the total attorney fee should be divided on this per capita basis and that they should be paid 10 percent of 3,066/4,296ths of the total award, and the Oklahoma attorneys paid 10 percent of 1,230/4,296ths of the total award. The difficulty with this argument is that the award was not made, and could not be made on a per capita basis. Awards can only be made by the Commission to Indian Tribes. It does not have jurisdiction over claims of individual Indians. The award in this case was made to the Indiana Miamis and the Oklahoma Miamis as tribes and not to the individual Indians in each tribe. Of course, Congress could pay the award to the individual Indians on a per capita

basis. The indications are that it will do so. This is shown by the contents of H.R. 5199, introduced in the House of Representatives, 92d Congress, 1st Session, on March 1, 1971, which provides that the award in this case shall be paid to the enrollees on a per capita basis. This proposed law has not been finally passed by the Congress but is still pending. It gives some moral, if not legal, support to the contentions of the Indiana attorneys. It should be mentioned that at oral argument of this case, the Indiana attorneys stated that if their fee could not be fixed on a per capita basis, then the total attorney fee should be divided equally between them and the Oklahoma attorneys.

The Oklahoma attorneys, on the other hand, contend they should get the entire attorney fee of $143,966.60, saying they took the lead in the case, put on most of the evidence, and did most of the work. They cite the *Red Lake* case, *supra*. We have already pointed out why the *Red Lake* case is inapposite here as an authority for denying the Indiana attorneys a fee. The Commission agreed this was correct. So, the claim of the Oklahoma attorneys for all the fee must also be denied.

Finally, we come to the ultimate question of how the attorney fee should be divided. This question seems to solve itself when we look at the contracts of the attorneys, and the findings and award of the Commission. Each group of attorneys was entitled to 10 percent of the amount they recovered for their clients, as provided by their contracts and as supplemented by the findings of the Commission. The Commission found that neither the Oklahoma Miamis nor the Indiana Miamis was the full successor to the original Miami Tribe, although both are entitled to represent it. (14 Ind. Cl. Comm. 375, 444 (1964); 17 Ind. Cl. Comm. 427, 432 (1966); 24 Ind. Cl. Comm. 451 (1971) n. 1.) In the final judgments in both of our cases, it was provided:

> * * * [A]nd the petitioners *jointly* as representatives of the Miami Tribe * * * shall have and recover from the defendant the sum of $ * * *. [Emphasis supplied.] [20 Ind. Cl. Comm. 97, 112A, 129A.]

In "The Award and Apportionment of Attorneys' Fees" in these cases, the Commission stated:

> * * * There was, however, no division of the awards in these cases. The judgments were entered in favor of the

> Miami Tribe of Oklahoma and the Miami Indians of Indiana *jointly* as representatives of the Miami Tribe. [Emphasis supplied.] [24 Ind. Cl. Comm. 450, 454.]

Thus, it is clear that both tribes had equal standing in the cases and that the awards and judgments were made to them and rendered in their favor *jointly*. What do the words *joint* and *jointly* mean? We find that Webster's Third New International Dictionary, 1967, defines *joint* as follows:

> Common to two or more: held in common (as property); united in right or interest.

The word *jointly* is defined as:

> In a joint manner, as together, unitedly; joint tenancy.

Black's Law Dictionary 973 (4th ed. 1951), defines *jointly* thus:

> Unitedly, combined or joined together in unity of interest * * *. In a joint manner; * * *. * * * [H]eld or shared in common.

These definitions of the words "joint" and "jointly," together with the findings and award of the Commission, make it abundantly clear that the Indiana Miami Tribe and the Oklahoma Miami Tribe had equal shares in the awards. Their interests in the awards were much like those of joint tenants. Where joint tenants own property, real or personal, they are presumed to own it equally in the absence of evidence to the contrary. *See* 48 C.J.S. *Joint Tenancy* § 6 (1947), where it is stated:

> * * * The shares or interests of joint tenants *are presumed to be equal*. * * *.
>
> *Bank accounts*. Each tenant acquires a joint interest in the bank account at the time of the creation of the joint tenancy, *and is presumed to own an equal share in the account*; but this presumption is rebuttable. [Footnotes omitted.] [Emphasis supplied.]

In this case, there is no evidence or showing that these two tribes did not have an equal ownership in the award. The evidence is conclusively the other way. The Commission stated:

> * * * There was, however, *no division of the awards in these cases*. The judgments were entered in favor of the

> Miami Tribe of Oklahoma and the Miami Indians of Indiana *jointly* as representatives of the Miami Tribe. * * * [Emphasis supplied.] [24 Ind. Cl. Comm. 450, 454.]

The judgments themselves stated:

> * * * [A]nd the petitioners *jointly* * * * shall have and recover * * *. [Emphasis supplied.] [20 Ind. Cl. Comm. 97, 112A, 129A.]

It is clear from these findings, awards, and judgments of the Commission that the amounts recovered were shared and owned *equally* by both the Indiana Miamis and the Oklahoma Miamis, each tribe owning one-half. Therefore, it is inescapable that the Indiana attorneys recovered one-half of the total awards for their Indiana clients and the Oklahoma attorneys recovered one-half of the total awards for their Oklahoma clients. Accordingly, each group of attorneys is entitled to one-half of the total attorney fee awarded by the Commission.

Such a division of the attorney fees is not only in accord with the contracts of the attorneys, the services they rendered, the findings of the Commission, and the Indian Claims Commission Act, but also with the awards and final judgments of the Commission. Furthermore, it is right and just. As a precedent, this division of fees will, in our opinion, inure to the benefit of the Commission and the legal profession as well in the trial of future cases where more than one tribe of Indians are involved and are represented by different lawyers. It will tend to eliminate rivalry, bickering, overreaching, and competition among lawyers as to who will take the lead and put on the evidence in future cases. It will also expedite such trials by preventing duplication of effort by the attorneys, as well as corresponding duplication of evidence and endless arguments as to which attorney did the most work. These cases are troublesome enough without having difficulties of this nature.

We deny the appeal of the Oklahoma attorneys, and grant the appeal of the Indiana attorneys in part, and reverse the decision of the Indian Claims Commission in part, and remand the cases to the Commission with instructions to enter judgment for one-half of the attorney fees for the Indiana

attorneys and one-half of the attorney fees for the Oklahoma attorneys.

REVERSED AND REMANDED

DAVIS, *Judge*, dissenting:

The court's opinion weaves legal propositions together with factual evaluations to come up with what seems to me a mistaken result. I discuss first the legal points and then the court's factual appraisal of the two sets of attorneys' services.

I

The basic legal error, as I see it, in the court's opinion—leading to a marked inconsistency in the presentation—is its failure to recognize in the first four-fifths of its opinion that the claims belonged solely to the original Miami Tribe, not at all to the Oklahoma Miamis or the Indiana Miamis separately. This is the whole foundation of that portion of Part V of the opinion which divides the fee equally, but is ignored and contravened in Parts I, II, III and IV.

The stress in those earlier sections on the separate identity of the Indiana Miamis and Oklahoma Miamis, while true, is wholly beside the point. Those groups acted simply as representatives of the original Miami Tribe. This case would be exactly the same if, instead of entities like the Indiana Miamis and the Oklahoma Miamis, there were two separate unorganized groups of named individuals, purporting to represent the entire Miami Tribe, and filing independent suits on behalf of the whole Miami Tribe. The only relevant Indian group, for deciding the merits of these particular claims, is that original Miami Tribe. The Indian Claims Commission Act makes a clear distinction between plaintiffs (or petitioners) and claims; there can be, and often are, several plaintiffs pursuing a single claim. That is what happened here. The separate cases were not consolidated for the Commission's conveniences but because the *claims* were single and belonged only to the Miamis as a whole—it would have been quite impracticable to try these single, unitary claims in separate lawsuits just because several plaintiffs filed to push the same claims. A joint trial was essential.

Once it is recognized all the way through, as it must be,

that the Indiana Miamis and Oklahoma Miamis were both prosecuting the very same claims on behalf of the larger entity which once existed (just as if they were unorganized individual descendants), then it seems to me gravely wrong to hold that the Indian Claims Commission is barred from apportioning the attorneys' fees because of the contracts entered into by the two separate successor groups. The reference in 25 U.S.C. § 70n to fees fixed by a contract necessarily refers to cases where (a) there is only one petitioner before the tribunal, having one contract with an attorney (or set of attorneys) or (b) several petitioners pursuing a single claim, all of whom have jointly entered into an agreement with the attorneys. Where, as here, there is only a single claim but several independent petitioners, each with his own attorney and attorney-contract allowing 10% of the recovery, it is impossible to enforce the contracts as literally written, and Congress could not have so intended. The Commission would have to divide the 10% fee, just as we have held it would have to do if the same petitioner happened to retain successive lawyers, each guaranteed a 10% fee. *Sisseton and Wahpeton Bands or Tribes* v. *United States*, 191 Ct. Cl. 459, 423 F. 2d 1386 (1970). In that decision, we expressly rejected the point made by the successor lawyers that their fee of a full 10% had been stipulated in an approved contract, and therefore that the Commission had no power to fix any lesser sum for them. Because of the earlier participation of the other lawyers, we ruled that an apportionment necessarily had to be made.

I see no significant difference between the position and rights of two sets of attorneys for the same petitioner, one succeeding the other in pursuing the same claim, and two sets of attorneys representing different petitioners prosecuting the very same claim simultaneously. Neither group of lawyers can exclude the other by making a full 10% fee arrangement, nor can the Commission award more than 10% of the final joint award. 191 Ct. Cl. at 464–66, 423 F. 2d at 1388–89.

To say that in those circumstances each set of lawyers is entitled *by law* to half of the fee is to disregard what everyone knows—that attorneys can and often do differ very widely in their contribution to an ultimate victory—and thus

serve, if the contributions are unequal, to penalize the industrious while giving a windfall to the lazy, incompetent, or unmotivated. As in the instance of successive counsel, there should be "an evaluation of the contribution of the two independent sets of lawyers to the final result." 191 Ct. Cl. at 470, 423 F. 2d at 1392. There is no more reason in law or common experience to insist that simultaneous counsel, acting under separate contracts, are each entitled *by law* to 50% than to take that position (a stand we rejected in *Sisseton*) with respect to successive lawyers under separate agreements. Neither the Claims Commission Act nor the general rules applicable to attorneys' fees requires, or suggests, that result.

II

In Part IV of its opinion, the court holds that, in any event, the Commission did not have substantial support in the evidence for the 70%-30% apportionment it made. I disagree.

A major basis for the Commission's division was that counsel for the Oklahoma Miamis prepared all the exhibits on value, presented the plaintiffs' expert testimony on value, and handled the cross-examination of defendant's witnesses. The majority carp that Mr. Long, the plaintiffs' witness, was not an expert on value because he did not testify as to "fair market value" or give figures, but he did present evidence "that the area of the subject tracts was very favorable for agriculture, that the land was fertile and attractive to settlers, and that the lands were in demand at a good price." In my view, this clearly comprised "expert testimony on *value*"—the Commission's words (emphasis added)—even though no precise figure on *valuation* was given. Evidence as to the nature, saleability and fertility of land is evidence bearing directly on "value".

The court does not question the finding as to the cross-examination of defendant's witnesses, or the introduction of the exhibits, but seems to say, on its own, that in these particular circumstances both sets of attorneys were entitled to equal credit. This is for the Commission to say. I cannot announce of my own knowledge or from common experience

that, in all cases where separate sets of counsel appear for separate parties, both counsel always render equal service or always agree that, though one is to lead, his brother's fee is not to be reduced. In this instance, it obvious that the lawyers did not get together, apportion the work, or settle on the fee. In that situation, the Commission had no choice but to determine the relative value of the services as they were actually rendered in this specific case. This it did, obviously taking into account the fact that counsel for the Oklahoma Miamis bore the laboring oar as to the presentation of the Indians' own case, the opposition to the Government's defense, and the preparation of useful findings for the tribunal.

Moreover, the majority opinion omits the important factor that, as the Commission in effect found,[1] the Indiana Miamis' counsel spent a large part of their effort in trying to advance the interests of the Indiana Miamis as against those of the Oklahoma Miamis. We held in *Red Lake and Pembina Bands* v. *United States*, 173 Ct. Cl. 928, 938, 355 F.2d 936, 941 (1965):

> Where the "claim in question" is joint or combined, it is not a service in prosecution of that *common concern* to advance a particular advantage of only one of the interested groups at the expense of the others. The services for which the attorneys are to be compensated out of the * * * recovery consist of efforts to create and preserve that fund, not of unsuccessful attempts to capture it for one entity. [Footnote omitted; emphasis supplied.]

The Commission's findings here, together with the record, show that much of the services performed by the Indiana attorneys was not for the "common concern". These appellants fail to recognize that the services required to entitle them to a fee out of the common fund are those relating to the impropriety of the original treaty cessions as that claim related to the Miami Tribe in existence at the treaty dates. At those times, 1828, 1837, 1838 and 1840, there was only one Miami Tribe and it is on behalf of that unitary tribe that

[1] "The 19 exhibits introduced by Mr. Maloney concerned the relationship of his clients to the Miami Tribe as it existed on the treaty dates and other matters relating to a possible distribution of the prospective award."

recovery was sought and attained. Once that award is made, the common cause has been achieved and the statutory fee has been earned. Nevertheless, the Indiana lawyers made continued and persistent efforts to show the complete separation and autonomy of the two *current* tribes, so as to advance the Indiana Miamis' claim to participate in the recovery. That is a service for the Indiana Miamis alone and should be minimized in determining counsel's share of the entire fee. In apportioning the fee, the Commission was properly concerned with the type and extent of the services performed by each group of attorneys in terms of the relative contribution made for the benefit of the common concern, *i.e.* the recovery for the whole Miami Tribe.

The court emphasizes that the members of the Commission who passed upon the fees were not the same as those who sat at the trial in 1959. Personal or direct familiarity with the lawyers' work seems to me a relatively unimportant factor. The Commission is a continuing body with a continuing staff and an institutional memory based on the full records and files of all the proceedings in this case—and also on its great and continuing participation in Indian claims litigation. At the time we remanded the *Sisseton* case for apportionment of fees, we sent that case back, in 1970, to a Commission which was wholly different in composition from the one existing in 1951–1952 when the earlier set of lawyers (Disney and Brown) appeared in those proceedings. But we called the Commission "uniquely fitted" to make the division, and we did so because it had all the files and records on which to base a judgment, and equally because it can sense better than we, because of its general and accumulating experience, what is helpful in a lawyer's presentation of a case under the Indian Claims Commission Act and what is less useful, how much paper-filing is "busy work", what proportion actually contributes to a favorable result, what goes to the heart of the case, and what focuses only on the extremities.

III

I concure with the court that the fee should not be divided on a per capita basis, and that appellants in No. 8–71 (the counsel for the Oklahoma Miamis) are not entitled to the

entire fee. The correct result, in my view, would be to affirm the Commission in all respects. I am convenced that the proper standards were used and that the Commission's decision was neither arbitrary nor capricious and was based on substantial evidence in the record as a whole.

LARAMORE, *Senior Judge*, and NICHOLS, *Judge*, join in the foregoing dissenting opinion.

APPENDIX D

In the United States Court of Claims

(Decided October 13, 1972)

APPEAL No. 6-71

Ind. Cl. Comm. Docket Nos. 124-C, D, E, F/255, 256

IRA SYLVESTER GODFROY, ET AL., ETC.
v. The U.S.

APPEAL No. 8-71

Ind. Cl. Comm. Docket Nos. 124-D, E, F/256

THE MIAMI TRIBE OF OKLAHOMA, ET AL., ETC.
v. The U.S.

17 Ind. Cl. Comm. 427
20 Ind. Cl. Comm. 113
20 Ind. Cl. Comm. 97
24 Ind. Cl. Comm. 450

Robert C. Bell, attorney of record for David L. Kiley and Estate of Walter H. Maloney, Sr. (Appeal No. 6-71). *Walter H. Maloney, Jr.*, and *Kiley, Osborn, Kiley and Harker*, of counsel.

Louis L. Rochmes, attorney of record (Appeal No. 8-71). *Edwin Rothschild* and *Sonnenschein, Levinson, Carlin, Nath and Rosenthal*, of counsel.

W. Braxton Miller, with whom was *Assistant Attorney General Kent Frizzell*, for the United States.

Glen A. Wilkinson filed a brief for *Wilkinson, Cragun & Barker* as *amicus curiae*.

Marvin J. Sonosky filed a brief on his own behalf as *amicus curiae*.

477-525—72

Before COWEN, *Chief Judge*, LARAMORE and DURFEE, *Senior Judges*, DAVIS, SKELTON and NICHOLS, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

(Motion for Rehearing)

LARAMORE, *Senior Judge*, delivered the opinion of the court:

The appeals involved herein are from a decision by the Indian Claims Commission allowing and apportioning attorneys' fees based on recoveries by the Miami Tribe of Indians. Pursuant to an opinion of April 11, 1972, 198 Ct. Cl. 1, 458 F. 2d 93, this court reversed in part the decision of the Indian Claims Commission and remanded the cases to the Commission with instructions to reapportion the subject fees in accordance with that opinion. The appeals come before the court at this time on a Motion for Rehearing, filed May 10, 1972, by the attorney of record for the Miami Tribe of Oklahoma group, appellants in No. 8–61, and a response to that Motion by the attorney of record for the Miami Tribe of Indiana group, appellants in No. 6–71. Briefs *amicus curiae* in support of the Motion were filed by the firm and individual indicated above. After consideration thereof, and for the reasons which follow, the Motion for Rehearing is granted, the decision of April 11, 1972 is vacated and withdrawn, and the decision by the Indian Claims Commission involved in these appeals is affirmed.

The opinion of the court affirming the Commission is as follows:

The problem presented arises because there are two identifiable tribes that are qualified to retain attorneys pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70n (1970), but only one award made in two parts to the Miami Indian Tribe.[1] One of the descendant tribes, the Oklahoma Miamis, by their authorized attorneys, filed claims with the Indian Claims Commission which were designated as Docket Nos. 255 and 256. These claims included the same lands in North-

[1] The Indian Claims Commission decided in *Miami Tribe* v. *United States*, 17 Ind. Cl. Comm. 427 (1966) that neither faction of the Miami Tribe was the full successor to the original tribe but both are entitled to represent it.

ern and Central Indiana that were covered by claims filed on behalf of the other faction of the original Miami Tribe, the Miami Indian Tribe of Indiana. The cases filed on behalf of the Indiana Tribe were designated as Docket Nos. 124–C, 124–D, 124–E and 124–F. Thus having six separate cases with a question common to all, the Indian Claims Commission consolidated the cases into two separate dockets. The first, with a combined Docket No. of 124–C/255 arose from the cession of a reservation under a treaty made in 1828 and was finally resolved through settlement of the claim for the sum of $66,966 (20 Ind. Cl. Comm. 97 (1968)). The second case, with a consolidated Docket No. of 124–D, E. F/256 arose from the cession of 13 reservations by the Miami Tribe under three different treaties, one made in 1834, effective in 1837, one in 1838 and the other in 1840. These cases were also finally determined by settlement following a trial on the merits for the final amount of $1,373,000 (20 Ind. Cl. Comm. 113 (1958)).

In the prosecution of these claims the Miami Tribe of Oklahoma was represented, pursuant to Contract No. 42017, which was approved by the Bureau of Indian Affairs May 10, 1948, by the law firm of Sonnenschein, Levinson, Carlin, Nath & Rosenthal, but individually by Mr. Louis L. Rochmes. The Miami Tribe of Indiana was originally represented by Walter H. Maloney, Sr. by virtue of Contract No. 950 which was approved by the Bureau of Indian Affairs on June 7, 1951. Thereafter, the contract and representation was partially assigned to Walter H. Maloney, Jr. (with Walter H. Maloney, Sr. retaining "of counsel" rights) and the law firm of Kiley, Osborn, Kiley & Harker who in turn associated with Robert C. Bell, Jr.

Following the successful prosecution of the Indian claims, both sets of attorneys filed with the Indian Claims Commission for their fees. Both sets of lawyers were allowed the maximum 10 percent fee but no agreement could be reached between the lawyers as to how they should be divided. Therefore, application was made to the Indian Claims Commission for a decision as to a proper division of the fee awards. The Commission found, by their opinion of February 18, 1971, that both sets of attorneys had valid agreements with

their respective tribes for the maximum 10 percent fee and that both were diligent in representing and protecting the interest of their respective clients. (24 Ind. Cl. Comm. 450 (1971)). They, therefore, allowed the fee of $6,696.60 for Docket Nos. 255 and 124–C and a fee of $137,300 for Docket Nos. 256 and 124–D, E, and F. It was further decided that upon consideration of services rendered and the relative contribution made by each that the fees be apportioned on a basis of 70 percent of each fee to the law firm of Sonnenschein, Levinson, Carlin, Nath & Rosenthal, and 30 percent of each fee to the attorneys for the Miami Tribe of Indiana. From that decision the Oklahoma Tribe attorneys filed Appeal No. 6–71 wherein they seek an increase of the allocation with reference to Docket No. 124–D, E, and F/256. The attorneys for Miami Tribe of Indiana appeal in No. 8–71 seeking adjustment of the allocation in respect to both the above Docket No. and 124–C/255. After consideration of the appeal of the Indiana group and the cross-appeal of the Oklahoma attorneys we affirm the decision of the Indian Claims Commission.

While the type of case we have here is somewhat unusual, it is not the first time this court has had occasion to consider the problem. In *Chickasaw Nation* v. *United States*, 121 Ct. Cl. 41 (1951) a similar case was considered by this court except that in *Chickasaw* the appellant-intervenor was not an attorney of record. Because of that fact, this court dismissed the intervenor's petition stating that:

> Any dispute or claim by attorneys other than attorneys of record for services rendered whether by private contract or other obligation must be settled between the parties themselves or in another forum. [*Chickasaw*, *supra* at 45]

See also, *Beddo* v. *United States*, 28 Ct. Cl. 69 (1893); *Creek Nation* v. *United States*, 79 Ct. Cl. 778 (1934).

More recently, however, we entertained the case of *Red Lake and Pembina Bands* v. *United States*, 173 Ct. Cl. 928, 355 F. 2d 936 (1965). In that case the factual pattern was even more like the present situation in that the attorneys who could not settle on a division of fees were both attorneys of record. Therefore, the holding in *Chickasaw*, *supra*, was not in point and this court thus had to consider the jurisdic-

tional aspects in greater detail to decide if the Indian Claims Commission was authorized to make a final determination on the matter of entitlement. Preliminarily, it was held that the Commission had jurisdiction to determine whether the attorney applying for a fee is entitled to the compensation for which he had applied. This question was held to be clearly within the jurisdiction of the Commission since the determination of entitlement depends solely upon whether the attorney of record has performed "services" for his client pursuant to the terms of 25 U.S.C. § 70n, and there is no better place than the Indian Claims Commission to decide that question. Therefore, once it was determined that the entitlement issue was within the jurisdiction of the Commission, it was also decided that this court has jurisdiction to review since section 20(b) of the Indian Claims Commission Act, 25 U.S.C. § 70s(b) (1970) gives this court jurisdiction to review any "final determination" of the Commission.

Following the resolution of the jurisdiction question as to entitlement, this court was subsequently called upon to decide if the Commission had jurisdiction to go beyond entitlement to rule upon apportionment. In *Sisseton and Wahpeton Bands or Tribes* v. *United States*, 191 Ct. Cl. 459, 470, 423 F. 2d 1386 (1970) this court stated, in distinguishing the *Sisseton* case from the *Beddo* case, *supra*, that:

> * * * Under the Indian Claims Commission Act, the Commission must determine that such a fee-claiming attorney has rendered services "in prosecuting the claim in question" before he becomes entitled to compensation. *Red Lake and Pembina Bands* v. *United States*, *supra*, 173 Ct. Cl. 928, 933–34, 355 F. 2d 936, 938–39. If he is so found, payment is directed from the funds in the hands of the Government. The Act thus provides, in effect, that such a request for fees is an action against the United States of which the Commission (and this court, on appeal) has jurisdiction.

Moreover, and speaking directly to the apportionment question, it was decided that:

> * * * [no] other tribunal [Commission] can or is likely to know as much about the relative participation of the claimants. There are no private dealings or arrangements * * * to consider or adjudicate. The issue wholly depends on an evaluation of the contribution of the two

> independent sets of lawyers to the final result * * *. The task is one for which the Commission is uniquely fitted [footnote omitted; *ibid*, at 470–471].

Proceeding then with the substantive issues, we must return to the *Red Lake* case, *supra*. In *Red Lake*, the rule for entitlement, as developed, was that in order to be awarded a fee *services* must have been performed. More specifically, Judge Davis, writing for the court, stated:

> * * * The fees are specifically characterized as being "for *all services rendered in prosecuting the claim in question*", and the Commission is told to set an amount which is "adequate compensation *for services rendered* and results obtained" (emphasis added). Congress thus made the performance of services a *sine qua non* for compensation. [*Red Lake and Pembina Bands*, *supra*, at 933]

Further developing the standards for entitlement, the *Red Lake* decision emphasized that the *services* rendered must be in prosecution of "the claim in question"—the claim in question being defined as "* * * the demand, founded on the Treaty of October 2, 1863, *supra*. * * * ." (*Red Lake and Pembina Bands*, *supra*, at 937). Moreover, Judge Davis explained that:

> Where the "claim in question" is joint or combined, it is not a service in prosecution of that *common concern* to advance a particular advantage of only one of the interested groups at the expense of the others. The services for which the attorneys are to be compensated out of the * * * recovery consist of efforts to create and preserve that fund, not of unsuccessful attempts to capture it for one entity. [Footnote omitted; emphasis supplied; *Red Lake and Pembina Bands*, *supra*, at 938]

Thus, in *Red Lake*, Mr. Mills, the attorney seeking a portion of the attorney fees, was denied recovery since there was substantial evidence to show that his efforts were made not for the common concern, *i.e.*, the prosecution of the claim by the larger tribe to recover for lands ceded under a specific treaty, but instead his efforts were shown to be made for the benefit of only a portion of the larger tribe to the exclusion of the others. With that principle there can be no argument: moreover, it is clearly one that can be applied to more than just Mr. Mills in the *Red Lake* setting. Indeed, we are of the

opinion that the standard heretofore enunciated is one that should be applied to other similar situations and this case is no exception.

Like *Red Lake*, the case at bar also involves claims arising from treaty cessions by Indian groups which, between the terms of the treaties and the passage of the Indian Claims Commission Act, *supra*, had been divided into separate groups which filed separate petitions by separate counsel. The only difference that exists in this case is that here the attorneys are both entitled to a fee while in *Red Lake* one of the parties was not. Nevertheless, that difference does not vitiate the applicability of *Red Lake* since we are of the opinion that the question of entitlement is so closely related to the issue of apportionment that the same principles should be used to determine both.

In this case, attorneys for the Miami Tribe of Indiana appeal to us to increase the Commission's allocation of fees from 30 percent to 71 percent. This figure is based upon, first, the finding by the Commission that said attorneys are entitled to their fee and, second, the assertion that since the attorneys represent 71 percent of the present day descendants of the original Miami Tribe of Indians their part of the total fee should be allocated accordingly. Therefore, argues the Indiana attorneys, they should have 71 percent of the combined fee. Said Indiana counsel further argues that since distribution of the final award will be made on a *per capita* basis, 71 percent to the Indiana Tribe and only 29 percent to the Oklahoma contingent, the allocation of fees decided upon by the Commission should have been on a similar basis.

Throughout the Indiana attorneys' briefs, as well as in oral argument, great emphasis is placed upon the pure number of Indians each counsel represents as the indicator of how much each attorney should receive as their share of the lump-sum ten percent fee. On the other hand, the Oklahoma attorneys emphasize that the question should not be decided on the basis of the ultimate *per capita* distribution but instead should be decided on the basis of each attorney's *relative contribution*. Like the Indiana attorneys, however, Oklahoma counsel also argue that the Commission erred in Docket No. 124-D, E, F/256. They erred, allege the Oklahoma group, not in their

method of determination, but in the ultimate figures arrived upon. Oklahoma counsel feel that in judging the performance of the opposing groups, on a relative contribution standard, the Commission should have determined that the Indiana attorneys contributed nothing to the common concern and should, therefore, be entitled to no part of the fee allocated to Docket No. 124–D, E and F/256. They evidently concede that in Docket No. 124–C/255 Indiana counsel made at least a 30 percent contribution in achieving the ultimate settlement of $66,966 and, therefore, do not appeal that portion of the Commission's determination.

In resolution of the opposing positions of each group of lawyers we cannot fully agree with either side. As has been pointed out, the standard of *Red Lake* appears to us to be logically sound and legally applicable. By its very basic approach of connecting the determination of fees to the performance of services it necessarily excludes the proposition that fees are to be determined on a par with *per capita* distribution. That general proposition together with the further refinement of making those services specifically relate to the common concern persuade us that a *per capita* allocation is improper. However, because we cannot ignore the many hours and years of effort put forth by Mr. Maloney, *et al.*, we cannot agree with the Oklahoma counsel that Mr. Maloney and his co-counsel are entitled to nothing.

The Commission has found that all exhibits on value, which was the issue at trial, were prepared and introduced into evidence by the Oklahoma attorneys. They also found that the exhibits introduced by the Indiana attorneys only concerned the relationship of their clients to the Miami Tribe as it existed on the treaty dates, thus indicating that the services performed were not for the common concern but only for the Indiana Tribe. The Commission also found that the Oklahoma attorneys presented the expert testimony on value and handled the cross-examination of defendant's witnesses while the Indiana attorneys' main concern was with matters relating to distribution of the prospective awards. Indeed, the Indiana attorneys' continued and persistent efforts to show the complete separation and autonomy of the two tribes further indicate to us that the Commission was

correct in its holding and that the proper approach was taken by the Commission. The Indiana group fail to recognize that the services required to entitle them to a fee are those which advocate the impropriety of the original treaty cessions as it related to the tribe in existence at the treaty dates. At those times, 1828, 1837, 1838 and 1840, there was one Miami Tribe and it is on behalf of that tribe that recovery was sought and attained. Once that award is made the common cause has been achieved and the statutory fee has been earned. The post award services must of course be directed toward the interests of each attorney's particular client or clients. However, compensation for that type of service is not a matter to be determined by the Commission or this court on appeal. The Commission was concerned only with the type and extent of services performed by each group of attorneys in terms of the relative contribution made for the benefit of the common concern. The Commission heard the evidence and viewed each group of attorneys in action and the Commission was, therefore, in the best position to decide the contribution of each group of lawyers. Obviously, there could be no better judge of that question than the Commission itself. On this appeal of that final determination, we are convinced that the proper standards were used and that the decision of the Commission was neither arbitrary nor capricious and that it was based on substantial evidence. We, therefore, must dismiss both appeals and confirm the holding of the Indian Claims Commission.

DAVIS, *Judge*, concurring:

I join in the court's opinion and, in view of Judge Skelton's dissenting views, also incorporate here the pertinent portions of my dissent on the original decision in this case, 198 Ct. Cl. ——, ——, 458 F. 2d 93, 104.

SKELTON, *Judge*, dissenting:

On April 11, 1972, this court decided this case in a written opinion, 198 Ct. Cl. 1, 458 F. 2d 93, in which the attorney fees were equally divided between the competing attorneys. In my opinion, that decision was not only fair, just, and equitable, but was also correct as a matter of law. There has been no change in the facts or the law since that decision was

rendered by this court. The only events that have occurred since our original opinion was rendered are the following:

(1) The death of our former distinguished colleague, Judge Linton M. Collins, who voted with the majority in our opinion.

(2) An attorney for the Oklahoma Tribe has filed a Motion for Rehearing and an attorney for the Indiana Tribe has filed a response to such motion.

(3) Two prominent Washington law firms who have extensive litigation for many Indian tribes have filed *amicus curiae* briefs seeking to overturn our prior opinion in favor of a disproportionate award of attorney fees to the attorneys for the Oklahoma Miamis.

(4) One of our judges who voted with the majority in our prior opinion has changed his position and now votes with the present majority to overturn our former opinion.

Neither the motion nor the *amicus curiae* briefs have presented anything new. We have the same facts and the same law we had when we decided the case before. Nothing has been raised under our Rule 68 or otherwise that justifies the court in turning full circle in order to reverse our prior opinion. Such action is very rare and almost unprecedented where there has been no clerical error nor change in the facts or the law. In my opinion, the action is wholly unwarranted and unjustified.

Our prior opinion, with slight changes, is made a part of my dissent as follows:

The appeals now before the court are two separate appeals from a decision of the Indian Claims Commission following their decision allowing and apportioning attorney's fees based on recoveries for the Miami Tribe of Indians. The problem arises because there are two identifiable tribes that are qualified to retain attorneys pursuant to the Indian Claims Commission Act, 25 U.S.C. § 70n (1970), but only one joint award was to the two tribes as successors to the original Miami Indian Tribe.[1] One of the descendant tribes, the Oklahoma Miamis, by their authorized attorneys, filed claims with the Indian Claims Commission which were des-

[1] The Indian Claims Commission decided in *Miami Tribe* v. *United States*, 17 Ind. Cl. Comm. 427 (1966), that neither faction of the Miami Tribe was the full successor to the original tribe but both are entitled to represent it.

ignated as Docket Nos. 255 and 256. These claims included the same lands in Northern and Central Indiana that were covered by claims filed on behalf of the other faction of the original Miami Tribe, the Miami Indian Tribe of Indiana. The cases filed on behalf of the Indiana Tribe were designated as Docket Nos. 124–C, 124–D, 124–E and 124–F. Thus, having six separate cases with a question common to all, the Indian Claims Commission consolidated the cases into two separate dockets. The first, with a combined Docket No. of 124–C/255 arose from the cession of a reservation under a treaty made in 1828 and was finally resolved through settlement of the claim for the sum of $66,966 (20 Ind. Cl. Comm. 97 (1968)). The second case, with a consolidated Docket No. of 124–D, E, F/256 arose from the cession of 13 reservations by the Miami Tribe under three different treaties, one made in 1834, effective in 1837, one in 1838 and the other in 1840. These cases were also finally determined by settlement following a trial on the merits for the final amount of $1,373,000 (20 Ind. Cl. Comm. 113 (1968)).

In the prosecution of these claims the Miami Tribe of Oklahoma was represented, pursuant to Contract No. 42017, which was approved by the Bureau of Indian Affairs May 10, 1948, by the law firm of Sonnenschein, Levinson, Carlin, Nath & Rosenthal, but individually by Mr. Louis L. Rochmes. The Miami Tribe of Indiana was originally represented by Walter H. Maloney, Sr. by virtue of Contract No. 950 which was approved by the Bureau of Indian Affairs on June 7, 1951. Thereafter, the contract and representation was partially assigned to Walter H. Maloney, Jr. (with Walter H. Maloney, Sr. retaining "of counsel" rights) and the law firm of Kiley, Osborn, Kiley & Harber who in turn associated with Robert C. Bell, Jr.

Following the successful prosecution of the Indian claims, both sets of attorneys filed with the Indian Claims Commission for approval of their fees. Both sets of lawyers were allowed the maximum 10 percent fee but no agreement could be reached between the lawyers as to how they should be divided. Therefore, application was made to the Indian Claims Commission for a decision as to a proper division of the fee awards. The Commission found, by their opinion of

February 18, 1971, that both sets of attorneys had valid agreements with their respective tribes for the maximum 10 percent fee and that both were diligent in representing and protecting the interest of their respective clients. (24 Ind. Cl. Comm. 450 (1971). They, therefore, allowed the fee of $6,696.60 for Docket Nos. 255 and 124-C and a fee of $137,300 for Docket Nos. 256 and 124-D, E, and F. It was further decided that upon consideration of services rendered and the relative contribution made by each that the fees be apportioned on a basis of 70 percent of each fee to the Sonnenschein, Levinson, Carlin, Nath & Rosenthal firm and 30 percent of each fee to the attorneys for the Miami Tribe of Indiana. From that decision the Oklahoma Tribe attorneys filed appeal No. 6-71 wherein they seek an increase of the allocation with reference to Docket Nos. 124-D, E and F/256. The attorneys for Miami Tribe of Indiana appeal in No. 8-71 seeking adjustment of the allocation in respect to both the above Docket No. and 124-C/255.

The decision of the Indian Claims Commission made a disproportionate division of attorney fees between the two groups of attorneys in this case, and should be reversed. The decision is contrary to the contracts and the Indian Claims Commission Act, is at variance with the findings of the Commission, does violence to the rights of the attorneys representing the Miami Indians of Indiana by awarding fees rightfully belonging to them to the Oklahoma attorneys who are not legally entitled to them, and violates the rights of the Indiana Indians by imposing upon them the services of the Oklahoma attorneys whom they did not employ and with whom they have no privity of contract, and awards fees to such attorneys that belong to the Indiana Indians themselves if not paid to their attorneys. Furthermore, the decision is arbitrary and is not supported by substantial evidence, is unjust and inequitable, all as shown below.

I

The Contracts

I begin with the contracts which initiated the litigation. I will refer to the attorneys representing the Miami Indians of Indiana as the Indiana attorneys, and to such In-

dians as the Indiana Indians. In like manner, I will refer to the attorneys representing the Miami Indians of Oklahoma as the Oklahoma attorneys and to such Indians as the Oklahoma Indians.

The contract of the Oklahoma attorneys was made January 28, 1947, and it provides, among other things, as follows:

> THIS AGREEMENT, made and entered into * * *, by and between Harley T. Palmer, Chief * * * [and others] *acting for and on behalf of the Miami Tribe of Oklahoma*, party of the first part, and Sonnenschein. * * * [and others], attorneys at law, parties of the second part:
>
> WITNESSETH, That the party of the first part *on behalf of said Miami Tribe of Oklahoma* under the authority vested therein by resolution of a council of said Indians adopted on the 28th day of January, 1947, * * * contracts with, retains and employs the parties of the second part as attorneys * * *.
>
> * * * * *
>
> It is agreed that the compensation of the parties of the second part for the services to be rendered under the terms of this contract is to be *wholly* contingent upon a recovery *for the tribe*. The parties of the second part shall receive as such compensation ten per centum (10%) of any and all sums recovered or procured, through efforts, in whole or in part, *for said Indians*, * * *. [Emphasis supplied.]
>
> * * * * *

The contract was signed by the Chief, Second Chief, and a Councilman, as "Tribal Delegates," and by a member of said law firm.

The Honorable William M. Thomas, Judge of the Seventh Judicial District Court of Oklahoma, put a certificate on the contract, certifying that:

> * * * Harley T. Palmer, * * * [and others] * * * entered into, signed and executed * * *, *for and on behalf of the Miami Tribe of Oklahoma*, the contract * * *; that, as then stated to me, the *Miami Tribe of Oklahoma* are the parties on the one side, and Sonnenschein * * * [and others], attorneys at law, on the other. [Emphasis supplied.]

Also attached to the contract is a certificate of Honorable William J. Campbell, Judge of the U.S. District Court of the Northern District of Illinois, in which he certified that Edward P. Morse, a member of the law firm of Sonnenschein

(et al.) entered into, signed, and executed the contract for and on behalf of said firm and:

> * * * [T]hat, as then stated to me, *the Miami Tribe of Oklahoma* is the party interested on the one side, and the said attorneys at law, Sonnenschein [et al.], the parties interested on the other. [Emphasis supplied.]

Attached to the contract is a copy of a resolution adopted by the Miami Tribe of Oklahoma at a meeting of that tribe, authorizing the execution of the contract with said attorneys, and appointing Chief Harley T. Palmer and others as delegates to execute the contract *for and on behalf of the Miami Tribe of Oklahoma.*

This contract was approved by William Zimmerman, Jr., Acting Commissioner of Indian Affairs of the Department of Interior. It is the sole authority of the Oklahoma attorneys to act in these cases.

I turn now to the contract of the Indiana attorneys. This document was executed on October 31, 1949, by and between the Miami Indians of Indiana, acting by and through its authorized delegates Ira Sylvester Godfroy (et al.) as party of the first part, and Walter H. Maloney (et al.) attorneys at law, parties of the second part. The contract provided, among other things:

> That the party of the first part, * * * under authority vested by resolution adopted by a majority vote of said Indians, assembled in special session on July 16, 1949, a copy of which is hereto attached * * * hereby contracts with, retains and employs the parties of the second part as attorneys in the matters hereinafter mentioned and set out, * * *.
>
> * * * * *
>
> * * * The parties of the second part shall receive as such compensation ten per centum (10%) of any and all sums recovered or procured through efforts, in whole or in part, *for said party of the first part*, * * *. [Emphasis supplied.]
>
> * * * * *

Attached to the contract is a certificate of Henry S. Bailey, Judge of the Circuit Court of Miami County, Indiana, in which he certified that Ira Sylvester Godfroy (et al.):

> * * * [T]he duly delegated representatives *on behalf of the Miami Indians of Indiana* * * * entered into,

> signed and executed * * * *for and on behalf of the Miami Indians of Indiana*, the contract * * * and, as stated to me, said delegates, acting for and on behalf of themselves *and the Miami Indians of Indiana*, is the party interested on the one side, and Walter H Maloney * * * [et al.] are the parties interested on the other side. [Emphasis supplied.]

Also attached to the contract is a certificate of James R. Kirkland, Judge of the District Court of the District of Columbia in which he certified that Walter H. Maloney, in his presence, executed the contract, and:

> * * * [A]s stated to me, *The Miami Indians of Indiana*, acting by and through its duly authorized agents, Ira Sylvester Godfroy * * * [et al.] is the party interested on the one side and Walter H. Maloney is the party interested on the other. [Emphasis supplied.]

Attached to the contract was the following resolution in pertinent part:

> RESOLVE that *the Miami Indians of the State of Indiana* assembled in special session this 16 day of July, 1949, select by a majority vote of all members Ira Sylvester Godfroy * * * [et al.] to sign contracts *for and on behalf of themselves and all others, legal members of the Miami Tribe of the State of Indiana*, for the purpose of prosecuting claims for all members of said Miami Tribe. * * * [Emphasis supplied.]

This contract was approved by D. S. Myer, Commissioner of Indian Affairs, with minor changes, one of which was to change the attorney fee to "not to exceed" 10 percent of any and all sums recovered or procured for said party of the first part (the Miami Indians of Indiana).

It is clear from these contracts that the Oklahoma attorneys were authorized to represent *only* the Oklahoma Indians and had no authority whatever to represent the Indiana Indians. In like manner, the Indiana attorneys were authorized to represent *only* the Indiana Indians and had no authority whatever to represent the Oklahoma Indians.

In due time, the two groups of attorneys filed separate suits for their respective clients pursuant to their contracts. The cases were consolidated for trial by the I.C.C. on December 19, 1958.

II

The Indian Claims Commission Act Limits the Authority of the I.C.C. To Fix Attorney Fees

The Indian Claims Commission Act (25 U.S.C. § 70n (1970)) provides as follows:

> § 70n. Attorneys of claimants; selection, practice and fees; Attorney General to represent United States; compromise of claims.
>
> Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, *of its own selection*, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, *unless* the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, *be fixed by the Commission* at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, *finds to be adequate compensation for services rendered and results obtained*, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim: *but the amount so fixed by the Commission*, exclusive of reimbursements for actual expenses, *shall not exceed 10 per centum of the amount recovered* in any case. * * * [Emphasis supplied.]

It will be observed that the Act does not authorize the I.C.C. to fix attorney fees if the fees are stipulated in an approved contract. It is only where the fees are not so stipulated that the I.C.C. can determine them. This is because the Act provides that *unless* the fees are stipulated in an approved contract, the Commission shall fix the fees. The converse of this provision deprives the Commission of this authority if the fees are stipulated in the contract.

Applying this statute to the case before us, it appears that the Commission had no authority to fix the fees of the Oklahoma attorneys because their approved contract stipulated that their fee would be 10 percent of the amount recovered for the Oklahoma Indians. According to the terms of the Act,

this fee could not be increased nor decreased by the Commission. Of course, the attorneys must render some services in order to get their fee. *See Red Lake and Pembina Bands* v. *United States*, 173 Ct. Cl. 928, 355 F. 2d 936 (1965). Therefore, when the Commission increased the attorney fee of the Oklahoma attorneys above 10 percent of the amount they recovered for the Oklahoma Indians by awarding such attorneys an additional fee based on the recovery of the Indiana Indians, it exceeded its authority and acted contrary to the Act.

Furthermore, even if it could be assumed arguendo that as a general proposition the Commission had the authority to increase the attorney fees of the Oklahoma attorneys, it acted directly contrary to another provision of the Act by increasing such fees above 10 percent of the amount recovered by them for their clients. The Act provides:

> * * * [T]he amount [of attorney fees] so fixed by the Commission * * * shall not exceed 10 per centum of the amount recovered in any case. * * *

The words in the Act "shall not exceed 10 per centum" clearly means "shall not exceed 10 per centum of the amount recovered *by the attorneys for their clients* in any case."

The situation with respect to the fee of the Indiana attorneys is somewhat different. It will be remembered that their contract provided that their fee would be "not more than" 10 percent of the amount recovered for the Indiana Indians. Under these circumstances, the Commission had the authority to fix their fees at an amount less than 10 percent of said recovery. That was done here. The amount of the reduction, however, belonged to the Indiana Indians. In the case of *Sisseton & Wahpeton Bands* v. *United States*, 191 Ct. Cl. 459, 423 F. 2d 1386 (1970), this court said:

> * * * The United States holds the sums awarded in trust for the Indians, and the [attorney] fees are to come from those funds. * * * [*Id.* at 470, 423 F. 2d at 1391.]

Consequently, the Commission had no authority to take any part of these trust funds from the Indiana Indians and award them as increased fees to the Oklahoma attorneys who had no contract with the Indiana Indians and had no au-

thority to represent them. The Indiana Indians would have just cause for complaint if the decision of the Commission should be carried out and trust funds of such Indians are paid to the Oklahoma attorneys as fees.

III

The Indiana Indians had the right under the Indian Claims Commission Act to Select their own Attorneys

Section 70n of the Indian Claims Commission Act, quoted above, provides:

> Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, *of its own selection*, * * *. [Emphasis supplied.]

In this case, the Indiana Indians selected and retained the Indiana attorneys to represent them. They did not select nor retain the Oklahoma attorneys to represent them. Yet, the decision of the Commission forces the services of the Oklahoma attorneys upon them and pays such attorneys' fees with funds that belong either to the Indiana attorneys or to the Indiana Indians. This has deprived these Indians of their right to select their own attorneys which is guaranteed to them by the Act.

IV

The Disproportionate Award of Attorney Fees by the Commission conflicts with its findings

This is not a case like *Red Lake and Pembina Bands* v. *United States*, *supra*, where an attorney was denied attorney fees because he had not rendered any services at all. On the contrary, in the present case the facts show that the Indiana attorneys rendered valuable and diligent services for over twenty years, including conferences with the Indians, research, preparing and filing petitions and other pleadings, introduction of evidence, participation in hearings and trials, filing briefs, presenting oral arguments, and representing their clients in an able manner for more than two decades. For these reasons, the *Red Lake* case is not applicable.

The above facts are shown by the findings of the Commission as follows:

> 3. * * * Upon examination of the record of proceedings before this Commission in the claims under Docket Nos. 124-C, D, E, and F, we find that the attorneys for the Indiana Miamis have rendered valuable services in the successful prosecution of the claims. The attorneys participated in the trial, briefing and argument before the Commission in the claims involved in Docket Nos. 124-D, E, and F. * * * The attorneys for the Indiana Miamis participated in the required settlement procedures, [of Docket Nos. 255 and 124-C] as set forth in detail in the Commission's findings of fact on the compromise settlements in both cases.
>
> * * * * *
>
> 6. The Commission finds that the attorneys for the Miami Indians of Indiana are entitled to a fee of ten percent as compensation for services rendered in the prosecution of the claims under Docket Nos. 124-C, D, E and F.
>
> * * * * *
>
> 8. * * *
>
> Counsel for both Miami groups were diligent in representing and protecting the interests of their respective clients. * * * [24 Ind. Cl. Comm. 450, 461-63 (1970).]

In *The Award and Apportionment of Attorneys' Fees*, the Commission stated:

> * * * The attorneys for the Indiana Miamis have rendered valuable services in the successful prosecution of their clients' claims. The attorneys participated in the trial, briefing and argument before the Commission in the claims involved in Docket Nos. 124-D, E, and F. * * * The Commission concludes that the attorneys for the Miami Indians of Indiana are entitled to a fee of ten percent for their services rendered in the prosecution of the claims under Docket Nos. 124-C, D, E, and F.
>
> * * * * *
>
> Counsel for both Miami groups were diligent in representing and protecting the interests of their respective clients. * * * [24 Ind. Cl. Comm. 450, 452-53, 455 (1970)].

These findings and conclusions of the Commission show without question that the Indiana attorneys rendered valuable and conscientious services for the Indiana Indians, and

by reason thereof, are entitled to their fee of 10 percent of the amount recovered for their clients. In fact, the Commission so found. Notwithstanding these findings and conclusions, the Commission arbitrarily denied them the 10 percent fee and allowed them only 30 percent of the total 10 percent fee in the sum of $143,996.60 and allowed the Oklahoma attorneys a fee of 70 percent of this amount.

The reasoning of the Commission was that the Oklahoma attorneys took the lead in the case and introduced all the exhibits on land value, which was the issue in the case. The Indiana attorneys say that to facilitate an orderly trial they allowed the Oklahoma attorneys to proceed first, not realizing or even suspecting that by doing so the Oklahoma attorneys would later claim the entire attorney fee. Furthermore, the Indiana attorneys say that no witness on value was put on the stand by the Oklahoma attorneys and support this by the following statement of one of such attorneys during the trial.

> We have deliberately not put on a so-called expert to guess at what the value of the Indian lands were 150 years ago or about 110 years ago it is, * * * because we know that this Commission is as well qualified to determine from the evidence, historical, geographical and economic evidence, before it as any real estate man might be, to set a value. [Tr. 127, June 29, 1959.]

To justify its decision, the Commission said:

> * * * The Sonnenschein firm [Oklahoma attorneys] presented the plaintiffs' expert testimony on value * * *. [24 Ind. Cl. Comm. 450, 463–64.]

This statement does not appear to be correct. The Commissioners who made the findings of fact in the case found:

> 33. In the course of the trial, *petitioners* presented one witness, Mr. John Long, who testified as an expert in the fields of economic history and geography. * * * The gist of Mr. Long's testimony was that the area of the subject tracts was very favorable for agriculture, that the land was fertile and attractive to settlers, and that the lands were in demand at a good price. *He gave no opinion as to the fair market value of the subject lands, nor did he submit a written report.* [Emphasis supplied.] [14 Ind. Cl. Comm. 375, 429, 430.] [Finding 33.]

This finding is significant for two reasons. In the first place it shows that the Commissioners considered that Mr. Long

was a witness of both the Indiana and Oklahoma Tribes and not of the Oklahoma Tribe alone, because they stated that the *petitioners* presented one witness. In the second place, this finding shows that the present Commission was mistaken in saying the Oklahoma attorneys presented "the plaintiff's testimony on value." Actually, the record shows that only the defendant presented expert witnesses on value. The Commission found:

> Defendant presented the testimony of several expert witnesses. [14 Ind. Cl. Comm. 375, 430.]

These experts were Dr. Theodore Carlson, Mr. Thomas M. Bushnell, and Dr. Homer Hoyt. Dr. Hoyt was an expert appraiser. (See 14 Ind. Cl. Comm. 375, 431.) The Commission determined value from these defense witnesses, along with historical, geographic, economic, climatic, and other public information. The Oklahoma attorneys could hardly be given credit for this evidence.

The Indiana attorneys point out that the 77 exhibits on value introduced by the Oklahoma attorneys were duplicates of exhibits introduced in evidence in a prior case (Docket 67/124) in which both groups of attorneys participated. The cost of these exhibits was paid jointly by the Indiana and Oklahoma Indians. Both had a property right in them. Also, they were public records once they were put in evidence in the prior case. These facts were admitted by the Oklahoma attorneys in their proposed finding number 5 of their application for fees when they said:

> * * * [T]here were received in evidence on behalf of the petitioners 77 exhibits, all of which had previously been introduced by the parties in Docket 67.

This was also admitted by the Oklahoma attorneys on page 6 of their brief.

Obviously the Indiana attorneys could have introduced copies of the same documents and would no doubt have done so had they known the Oklahoma attorneys were going to claim the entire attorney fee because of these exhibits. They point out they did introduce 69 exhibits (not 19 as stated by the Commission).

In our opinion, this evidence falls far short of being substantial evidence that will support the decision of the Com-

mission in apportioning the attorney fees. Almost everyone who has ever practiced law has sooner or later found himself in a case where he has been associated with other attorneys in a common cause. Someone has to take the lead in the case. Only one lawyer can talk or proceed with the evidence at one time. In such instances, the attorneys agree as to what evidence will be introduced and which attorney will take the lead and proceed. But it would be an unheard of occurrence for the lawyer who takes the lead and puts on the evidence to claim the entire attorney fee. This is contrary to the universal custom and practice of lawyers everywhere. It is incredible that the Oklahoma attorneys would claim the entire attorney fee, or any amount above the 10 percent of the recovery for their clients as specified in their contract.

The entire membership of the Commission changed after the trial in 1959. The members of the present Commission who apportioned and fixed the attorney fees did not hear the evidence nor participate in the trial on the merits.[2] Consequently, they are in no better position to decide what the lawyers did nor the fee they are entitled to than we are. All they have to go by is the cold record itself and that is available to us also. In my opinion, the record considered as a whole does not support the decision of the Commission.

The Commission has found and concluded that the Indiana attorneys rendered valuable services in the successful prosecution of the claims of their clients, and that they were diligent in representing and protecting the interests of their clients, and that they are entitled to a fee of 10 percent for their services rendered. Yet, in the face of these findings, the Commission denied them the 10 percent attorney fee. This decision conflicts with the findings of the Commission and is arbitrary.

Furthermore, it should be noted that the consolidation of the cases by the Commission was solely for the purpose of

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[2] The members of the Indian Claims Commission who made the Findings of Fact in this consolidated case were Arthur V. Watkins, William Holt, and T. Harold Scott. See their Findings of Fact and Interlocutory Order in 14 Ind. Cl. Comm. 375, 483.

The membership of the Commission that made the award and apportionment of attorneys' fees, findings of fact and the order awarding such fees on Feb. 18, 1971, was completely different and was composed of John T. Vance, Jerome K. Kuykendall, Richard W. Yarborough, Margaret H. Pierce, and Brantley Blue. See 24 Ind. Cl. Comm. 450, 467.

the trial and was for the convenience of the Commission as well as the parties. The consolidation did not consolidate nor merge the Indiana and Oklahoma Tribes. They remained separate and distinct tribes or bands of identifiable Indians. They could not be merged into one tribe by the Commission. As a matter of fact, the Indiana Indians could not be members of the Oklahoma Tribe because the latter was organized as an agricultural co-operative under an Oklahoma Indian Welfare Act (49 Stat. 1967, 25 U.S.C. § 501 (1964)), which was restricted to the Miami Indians residing in Oklahoma. The Commission so held in 14 Ind. Cl. Comm. 375, 440, when it said:

> As applied to the case in issue, *the Miami Indians of Indiana*, petitioner in Docket Nos. 124–D, 124–E, and 124–F, *are not members of the Miami Tribe of Oklahoma nor can they become members, according to the restrictions placed on membership by the constitution and by-laws of the Miami Tribe of Oklahoma.* [Emphasis supplied.]

Also, the consolidation of the cases for trial by the Commission did not merge the contracts of the attorneys into one contract. The Commission had no power nor authority to effect such a merger. Consequently, the two groups of attorneys continued to represent their respective clients in accordance with their contracts and are entitled to be paid fees as provided in the contracts for the valuable and diligent services the Commission found they rendered.

V

The Attorney Fees should be divided equally between the Indiana Attorneys and the Oklahoma Attorneys

The Commission has allowed an attorney fee in the total sum of $143,996.60. The Indiana attorneys say that they should receive an attorney fee of 70.1 percent of this total fee, which 70.1 percent amounts to $102,768.53. They support this claim by showing that the roll of the Miami Indians ordered by Public Law 89–659 of October 14, 1966 (80 Stat. 909), was completed and approved by the Secretary of Interior on June 25, 1969, and showed 4,296 enrollees, 1,230 being Oklahoma Miamis and 3,066 being Indiana Miamis. The Indiana attorneys argue that the total attorney fee

should be divided on this per capita basis and that they should be paid 10 percent of 3,066/4,296ths of the total award, and the Oklahoma attorneys paid 10 percent of 1,230/4,296ths of the total award. The difficulty with this argument is that the award was not made, and could not be made on a per capita basis. Awards can only be made by the Commission to Indian Tribes. It does not have jurisdiction over claims of individual Indians. The award in this case was made to the Indiana Miamis and the Oklahoma Miamis as tribes and not to the individual Indians in each tribe. Of course, Congress could pay the award to the individual Indians on a per capita basis. The indications are that it will do so. This is shown by the contents of H.R. 5199, introduced in the House of Representatives, 92d Congress, 1st Session, on March 1, 1971, which provides that the award in this case shall be paid to the enrollees on a per capita basis. This proposed law has not been finally passed by the Congress but is still pending. It gives some moral, if not legal support to the contentions of the Indiana attorneys. It should be mentioned that at oral argument of this case, the Indiana attorneys stated that if their fee could not be fixed on a per capita basis, then the total attorney fee should be divided equally between them and the Oklahoma attorneys.

The Oklahoma attorneys, on the other hand, contend they should get the entire attorney fee of $143,966.60, saying they took the lead in the case, put on most of the evidence, and did most of the work. They cite the *Red Lake* case, *supra*. I have already pointed out why the *Red Lake* case is inapposite here as an authority for denying the Indiana attorneys a fee. The Commission agreed this was correct. So, the claim of the Oklahoma attorneys for all the fee must also be denied.

Finally, I come to the ultimate question of how the attorney fee should be divided. This question seems to solve itself when we look at the contracts of the attorneys, and the findings and award of the Commission. Each group of attorneys was entitled to 10 percent of the amount they recovered for their clients, as provided by their contracts and as supplemented by the findings of the Commission. The Commission found that neither the Oklahoma Miamis nor the Indiana Miamis was the full successor to the original Miami Tribe, although both are entitled to represent it. (14

Ind. Cl. Comm. 375, 444 (1964); 17 Ind. Cl. Comm. 427, 432 (1966); 24 Ind. Cl. Comm. 451 & n. 1 (1971).) In the final judgments in both of our cases, it was provided:

> * * * [A]nd the petitioners *jointly* as representatives of the Miami Tribe * * * shall have and recover from the defendant the sum of $ * * *. [Emphasis supplied.] [20 Ind. Cl. Comm. 97, 112A, 129A.]

In "The Award and Apportionment of Attorneys' Fees" in these cases, the Commission stated:

> * * * There was, however, no division of the awards in these cases. The judgments were entered in favor of the Miami Tribe of Oklahoma and the Miami Indians of Indiana *jointly* as representatives of the Miami Tribe. [Emphasis supplied.] [24 Ind. Cl. Comm. 450, 454.]

Thus, it is clear that both tribes had equal standing in the cases and that the awards and judgments were made to them and rendered in their favor *jointly*. What do the words *joint* and *jointly* mean? I find that Webster's Third New International Dictionary, 1967, defines *joint* as follows:

> Common to two or more; held in common (as property); united in right or interest.

The word *jointly* is defined as:

> In a joint manner, as together, unitedly; joint tenancy.

Black's Law Dictionary 973 (4th ed. 1951), defines *jointly* thus:

> Unitedly, combined or joined together in unity of interest * * *. In a joint manner; * * *. * * * [H]eld or shared in common.

These definitions of the words "joint" and "jointly," together with the findings and award of the Commission, make it abundantly clear that the Indiana Miami Tribe and the Oklahoma Miami Tribe had equal shares in the awards. Their interests in the awards were much like those of joint tenants. Where joint tenants own property, real or personal, they are presumed to own it equally in the absence of evidence to the contrary. *See* 48 C.J.S. *Joint Tenancy* § 6 (1947), where it is stated:

> * * * The shares or interests of joint tenants *are presumed to be equal*, * * *.

> *Bank accounts.* Each tenant acquires a joint interest in the bank account at the time of the creation of the joint tenancy, *and is presumed to own an equal share in the account;* but this presumption is rebuttable. [Footnotes omitted.] [Emphasis supplied.]

In this case, there is no evidence or showing that these two tribes did not have an equal ownership in the awards. The evidence is conclusively the other way. The Commission stated:

> * * * There was, however, *no division of the awards in these cases.* The judgments were entered in favor of the Miami Tribe of Oklahoma and the Miami Indians of Indiana *jointly* as representatives of the Miami Tribe. * * * [Emphasis supplied.] [24 Ind. Cl. Comm. 450, 454.]

The judgments themselves stated:

> * * * [A]nd the petitioners *jointly* * * * shall have and recover * * *. [Emphasis supplied.] [20 Ind. Cl. Comm. 97, 112A, 129A.]

It is clear from these findings, awards, and judgments of the Commission that the amounts recovered were shared and owned *equally* by both the Indiana Miamis and the Oklahoma Miamis, each tribe owning one-half. Therefore, it is inescapable that the Indiana attorneys recovered one-half of the total awards for their Indiana clients and the Oklahoma attorneys recovered one-half of the total awards for their Oklahoma clients. Accordingly, each group of attorneys is entitled to one-half of the total attorney fee awarded by the Commission.

Such a division of the attorney fees is not only in accord with the contracts of the attorneys, the services they rendered, the findings of the Commission, and the Indian Claims Commission Act, but also with the awards and final judgments of the Commission. Furthermore, it is right and just. As a precedent, this division of fees will, in my opinion, inure to the benefit of the Commission and the legal profession as well in the trial of future cases where more than one tribe of Indians are involved and are represented by different lawyers. It will tend to eliminate rivalry, bickering, overreaching, and competition among lawyers as to who will take the lead and put on the evidence in future cases. It will also

expedite such trials by preventing duplication of effort by the attorneys, as well as corresponding duplication of evidence and endless arguments as to which attorney did the most work. These cases are troublesome enough without having difficulties of this nature.

I would deny the appeal of the Oklahoma attorneys, and grant the appeal of the Indiana attorneys in part, and reverse the decision of the Indian Claims Commission in part, and remand the cases to the Commission with instructions to enter judgment for one-half of the attorney fees for the Indiana attorneys and one-half of the attorney fees for the Oklahoma attorneys.

COWEN, *Chief Judge*, joins in the foregoing dissenting opinion.

U.S. GOVERNMENT PRINTING OFFICE, 1973

APPENDIX E

In the United States Court of Claims

(February 22, 1973)

App. No. 6-71

IRA SYLVESTER GODFROY, ET AL., ETC. v. THE UNITED STATES

App. No. 8-71

THE MIAMI TRIBE OF OKLAHOMA, ET AL., ETC. v. THE UNITED STATES

Robert C. Bell, attorney of record for David L. Kiley and Estate of Walter H. Maloney, Sr. (attorneys for appellants in Appeal No. 6-71 and for appellees in Appeal No. 8-71). *Walter H. Maloney, Jr.*, and *Kiley, Osborn, Kiley and Harker*, of counsel.

Louis L. Rochmes, attorney of record (attorney for appellees in Appeal No. 6-71 and for appellants in Appeal No. 8-71). *Edwin Rothschild* and *Sonnenschein, Levinson, Carlin, Nath and Rosenthal*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE and DURFEE, *Senior Judges*, DAVIS, SKELTON and NICHOLS, *Judges*.

ON MOTION FOR REHEARING

PER CURIAM: These cases come before the court on the motion, filed November 6, 1972, for rehearing for David A. Kiley and Estate of Walter H. Maloney, attorneys for peti-

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tioners in Appeal No. 6-71. Upon consideration thereof, together with the opposition filed thereto, without oral argument,

IT IS ORDERED that the said motion for rehearing be and the same is denied.

SKELTON, *Judge*, dissenting:

The Indiana attorneys, who have represented the Miami Tribe of Indiana in these cases, have filed a motion for rehearing with reference to the opinion of this court of October 13, 1972, which, by a divided court, reversed the decision of the court of April 11, 1972. I would grant the motion for rehearing for all of the reasons set forth in the court's original opinion and in my dissent to the opinion of October 13, 1972, and for the additional compelling reasons.

The movants show that new evidence in the form of Public Law 92-309, 92d Congress, H.R. 5199 of June 2, 1972, divides the award on a per capita basis so that the 3,066 Miamis of Indiana and the 816 Miamis of Oklahoma will share the award on a per capita basis. This shows that the Oklahoma attorneys only recovered 816/3882nds of the total awards for the Miami Tribe of Oklahoma and the Indiana attorneys recovered the remainder (3066/3882nds) for the Miami Tribe of Indiana. Of course Congress can pay the award any way it sees fit, but this statute has an important bearing on the equities in this appeal. Both sets of attorneys were entitled to attorney fees of 10 percent of the amount each recovered for their clients. This was true not only because of their contracts but also according to the Indian Claims Commission Act and the findings of the Commission. But the Indian Claims Commission, and this court in its last opinion, have ignored both the contracts, the findings of the Commission, and the Act and have allocated fees contrary to them. This is amply and forcefully shown by Report No. 92-778, Calendar No. 745, Senate, 92d Congress, 2d Session, ordered printed May 3, 1972, which states the amounts of the awards and attorney fees and how the attorney fees are to be paid. This report shows that $66,966 is allotted to the Miami Tribe of Indiana and the Miami Tribe of Oklahoma, jointly in docket 225,124-C, and $1,373,000 to them jointly in docket 256,124-D, E and F. In docket 225,124-C the Congress has allowed a total of

$6,696.60 (10 percent) as attorney fees (*$4,687.62 chargeable against the Miami Tribe of Oklahoma* out of its recovery of $14,076.32 and $2,008.98 chargeable against the Miami Tribe of Indiana out of its recovery of $52,889.68).

In docket 256,124-D, E and F the Congress has allowed an attorney fee of $137,300 (10 percent) (*$96,110.00 chargeable against the Oklahoma Tribe* out of its recovery and $41,190.00 chargeable against the Indiana Tribe out of its recovery).

All of this leads to the ridiculous situation caused by the Commission's allowance of 70 percent of the total attorney fee to the Oklahoma attorneys and 30 percent to the Indiana attorneys, now affirmed by this court, whereby the Oklahoma attorneys are collecting 33.3 percent of the amount they recovered for their Oklahoma Indians when by contract and statute they were entitled to only 10 percent. On the other hand, the Indiana attorneys are collecting only 3.6 percent of the amount they recovered for their Indiana Indians when their contract and the statute entitles them to 10 percent and the Indiana Indians are willing to pay them the full 10 percent.

It was assumed in our prior opinions that the Indiana Indians would have to pay out of their recovery a part of the excess fees allotted to the Oklahoma attorneys (*i.e.*, a portion of the 70 percent of the total 10 percent of the total awards). Now it develops that this is not the case and that the entire excess of attorney fees paid to the Oklahoma attorneys will have to be paid by the Oklahoma Indians out of their recovery and not by the Indiana Indians. This is proper in a sense, inasmuch as they will be paying their own attorneys, but the amount (33.3 percent) is in excess of their contract and the statutory provisions (*i.e.*, 10 percent).

Thus, it appears that the two groups that are hurt by the decisions of the Commission and this court are (1) the Indiana attorneys, and (2) the Oklahoma Indians. Those who are benefited are (1) the Oklahoma attorneys, and (2) the Indiana Indians. It could be expected that such a result would occur when both the Commission and the court failed to follow the provisions of the statute and the contracts regarding attorney fees, notwithstanding the findings by the Commission that both sets of attorneys rendered valuable

and diligent services for their clients in the case and that each was entitled to an attorney fee of 10 percent.

Should it develop that the Indiana Indians are required to pay any part of the excess attorney fees of the Oklahoma attorneys, notwithstanding the appropriation by Congress and the above Senate Report, this would be illegal for several reasons. The Indiana Indians had no contract with the Oklahoma attorneys, had not employed them, had never promised to pay them anything and object to paying them a fee. They employed their own attorneys, which was a right guaranteed to them by the Indian Claims Commission Act.

The Oklahoma attorneys are not entitled to collect an attorney fee from the Indiana Tribe on the theory that these suits were class actions and they represented the Indiana Indians as a part of the class. This is because the record shows that the interest of the Oklahoma attorneys was adverse to that of the Indiana Tribe and such attorneys endeavored to prevent any recovery by them and sought the entire award for the Oklahoma Tribe. This proposition was first urged by the Indiana attorneys on pages 18–19 of their original brief in the first proceedings in this court where they quoted from the opinion of the Commission dated December 18, 1964, in pertinent part as follows:

> In this case it was also agreed, initially, that both petitioners were entitled to participate in any award made by the Commission (Tr. 8). However, petitioner in Docket 256 now contends that the Miami Tribe of Oklahoma should be the sole representative before this Commission of the Miami tribe that existed at the time of the subject treaties and that any award by the Commission should be made only to the Miami Tribe of Oklahoma on behalf of the Miami tribe as it existed as of the treaty dates. (14 Ind. Cl. Comm. 435). * * *
>
> The Secretary of Interior has never recognized the Miami Tribe of Oklahoma as the representative of the Indiana Miamis but on the contrary has approved a contract between the Indiana Miamis and their attorney to prosecute the present suit.
>
> In addition, the interest of the two groups of Miamis are not the same. It is to the interest of the Miamis of Oklahoma to be the full successor in interest to the original Miami Tribe and thus to keep any award within the corporate entity. They have made this claim in their

> petition and during the oral argument. It makes no difference that petitioner in Docket No. 256 declares it will represent all individuals entitled to share in a judgment and that some of the individual Indians in Indiana can participate in an award "if that is appropriate." (14 Ind. Cl. Comm. 440–441). * * *
> We have found, therefore, that petitioners in Dockets 124–D, E, and F have a right to representation of their own choosing before this Commission. (14 Ind. Cl. Comm. 442). * * *
> We have found, therefore, that neither of the petitioners is the full successor in interest to the original Miami tribe with whom the treaties were made inasfar as these treaties are concerned. Consequently, both petitioners are entitled to participate in the award and said award shall be made to both petitioners on behalf of the Miami tribe as it existed at the time the subject treaties took place. This is in accord with *Minnesota Chippewa* which made it clear that awards are to be made, "* * * not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today." (14 Ind. Cl. Comm. 444).

Said attorneys pointed out on page 18 of such brief:

> Not a little of the effort of Oklahoma Miami counsel was directed toward trying to obtain the awards in their entirety and solely for the Oklahoma Miami claimants. Not a little of the effort of Indiana Miami counsel was necessarily directed toward thwarting these efforts of Oklahoma Miami and their counsel to claim the entire tribal estate.

Again on pages 1-2 of the Reply Brief of the Indiana attorneys in the original proceeding in this court, we find the following statement:

> Legal counsel for the Oklahoma Miami Tribe in Dockets 255 and 256 did everything possible to defeat a recovery by the Indian [sic] Miami Tribe in their cases (Dockets 124–C, 124–D, 124–E and 124–F). They disclaimed representation of the Indiana Miami. It is indeed anomalous that they should now claim any portion of the credit for the recovery enjoyed by the Indiana Miami Indians * * *.

The same contention was expressed on pages 16 and 19 of such reply brief.

This proposition was raised again by the Indiana attorneys on page 2 of their Response to Motion for Rehearing filed May 26, 1972, as follows:

> The Indian Claims Commission appropriately cited and discussed at length (14 Ind. Cl. Comm. 437–443) the *McGhee* case and followed it when Oklahoma Miami counsel tried to pre-empt the cause of action of the Indiana Miami (asserting that the Oklahoma Miami were the sole legal entity and that the Indiana Miami had no right to press this claim).

The Indiana attorneys, on page 7 of the same Response stated:

> The Indian Claims Commission and this Court correctly held that the Indiana Miami and Oklahoma Miami were separate claimant groups or classes, each of which was entitled to separate legal counsel. This in conformity with the usual rule as stated in 59 American Jurisprudence (Parties) 2d § 60:
>
> > Diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Persons having interests adverse, antagonistic, or hostile to those of the persons purported to be represented cannot maintain a representative or class suit in behalf of the latter, or be sued as their representatives * * *. (Citing cases and 132 ALR 766.)

On page 12 of the same Response, the Indiana attorneys stated:

> A contract of employment is necessary to render one liable for the services of an attorney. (7 C.J.S. 1041)
>
> 7 American Jurisprudence 2d 166 states:
>
> > The creation of the relation of attorney and client by contract, express or implied, is essential to the right of an attorney to recover compensation for services. In general, there can be no recovery from one who did not employ or authorize employment of the attorney, however valuable the result of the attorney's services may have been. * * *
> >
> > The mere fact that the services an attorney renders for his client are beneficial to other parties does not entitle the attorney to recover any compensation from those benefitted.

In the present Motion for Rehearing, the Indiana attorneys state on page 7:

> IV. Oklahoma attorneys were hostile to the interests of Indiana Miami claimants and attempted to bar their recovery.
>
> Much of the effort of Oklahoma attorneys was directed toward defeating a recovery by Indiana Miami claimants and obtaining all proceeds for their clients and themselves.

In the Reply Memorandum in Support of the Indiana Attorneys' present Motion for Rehearing, it is stated on page 2 thereof that "Oklahoma attorneys were adverse to Indiana Miami claimants," and the findings of the Commission in 14 Ind. Cl. Comm. 435, *et seq.*, quoted above from the original brief of the Indiana attorneys in the original proceedings in this court are again quoted on pages 2–3 and urged by the Indiana attorneys in connection with the present Motion for Rehearing. On pages 4 and 5 of such Reply Memorandum, the following statements appear:

> It constitutes a manifest abuse of discretion to permit Oklahoma attorneys to recover any compensation from benefits accruing to Indiana Miami claimants when the work, efforts and representations of those attorneys were generally adverse to the interests of Indiana Miami claimants. At 7 Am. Jur. 2d, § 220 (Attorneys at Law), we read:
>
> > Unless he acted with the consent of both parties, an attorney may not recover for services rendered to parties having opposing or adverse interests growing out of the same transaction.
>
> Also, at 7 Am. Jur. 2d, § 154, at 139 (Attorneys at Law):
>
> > * * * It makes no difference how slight the adverse interest may be.
>
> 59 Am. Jur. 2d, § 60, at 432 states:
>
> > Diverse and potentially conflicting interests within the class are incompatible with the maintenance of a true class action. Persons having interests adverse, antagonistic, or hostile to those of the persons purported to be represented cannot maintain a representative or class suit in behalf of the latter, or be sued, as their representatives. * * *

Although the Oklahoma attorneys deny they tried to defeat any recovery by the Indiana Indians and that they

sought the entire recovery for the Oklahoma Indians, the findings of the Commission in 14 Ind. Cl. Comm. 435 quoted above refute this denial.

I have tediously belabored this point by citations from the record before us to allay any idea that this question has been raised for the first time by the Indiana attorneys in the present Motion for Rehearing. The proposition has been raised and urged by them at every stage of the proceedings in this court, although the court has not discussed it before.

It is clear that the Oklahoma attorneys cannot collect an attorney fee from the Indiana Tribe on the theory of a class action when their interest was adverse to that of such Tribe and they sought to defeat any recovery by the Tribe. The law is clear that an attorney cannot collect an attorney fee from the members of a class when he works against the interest of the class in the case. That appears to be the situation with respect to any claim of the Oklahoma attorneys for a fee from the Indiana Tribe before us. Of course, all of this is moot or academic if all of the fee awarded to the Oklahoma attorneys is paid out of the recovery of the Oklahoma Tribe as the Senate Report indicates it will be. It only becomes relevant if any part of such fee is claimed against the Indiana Tribe or collected from them.

I would grant the Motion for Rehearing of the Indiana attorneys and reapportion the attorney fees among the attorneys in accordance with the provisions of their contracts and the Indian Claims Commission Act and the findings of the Commission that each group of attorneys had rendered valuable and diligent services for their clients and each was entitled to an attorney fee of 10 percent [of the amount recovered by them for their respective clients].

COWEN, *Chief Judge*, joins in the foregoing dissent.

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